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HERBERT PARKER, of Lancaster, 1914–1915.
HENRY N. SHELDON, of Boston, 1915–1916.
CHARLES E. HIBBARD, of Pittsfield, 1916–1917.
ARTHUR LORD, of Plymouth, 1917–1918.
JOHN W. CUMMINGS, of Fall River, 1918–1919.
FREDERICK P. FISH, of Brookline, 1919–1920.
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THOMAS HOVEY GAGE, of Worcester, 1922–1923.
THOMAS W. PROCTOR, of Newton, 1923–1924.
GEORGE L. MAYBERRY, of Waltham, 1924–1925.
FRANKLIN G. FESSENDEN, of Greenfield, 1925–1926.
ERNEST H. VAUGHAN, of Worcester, 1926–1927.

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EIGHTEENTH ANNUAL MEETING.

The eighteenth annual meeting of the Massachusetts Bar Association was held at Plymouth, on Saturday, December 17, 1927. The morning session was held in Memorial Hall, followed by luncheon at the Hotel Samoset. A second session for the completion of the business was held in the hotel after luncheon.

MORNING SESSION.

The Association met at 11 A. M., with twenty-four present from different parts of the Commonwealth and the President, Mr. Ernest H. Vaughan of Worcester, in the chair.

PRESIDENT VAUGHAN.—You will please come to order. While the representation is not very general in number, it is rather general in the territory from which they come, so that we may fairly say that the Association is well represented as to location but rather sparsely represented as to numbers.

You have all had from the Secretary the report of the last annual meeting, which was printed in the QUARTERLY for February, 1927. Are there any suggestions or corrections to be made in reference to that report as you have received it? If not, I declare it approved as printed.

The report of the Treasurer will be in order. Judge Mason of Northampton.

REPORT OF THE TREASURER.

TREASURER JOHN W. MASON.—Mr. President and Gentlemen: I have my report as Treasurer, showing:

Balance from prior account in Mechanics Savings Bank of Worcester	$2,607.09
In Hampshire County Trust Co., Northampton	960.98
During the year we have collected from dues	4,220.00
We have had dividends from the Mechanics Savings Bank	118.62
Making the total receipts	$7,906.69
Expenses	3,062.41
Balance	$4,844.28

I have here an itemized account of the expenses, some fifty-one items, which I will not read unless somebody calls for them. At the present time there is a balance on hand in the Mechanics Savings Bank of Worcester, $2,725.71, and in the Hampshire County Trust Company, $2,118.57, making the total $4,844.28.

[The report was accepted and placed on file.]

REPORT OF EXECUTIVE COMMITTEE.

There has been little action by the Executive Committee during the year.

The Association was represented at the Conference of Bar Association Delegates, which met in Buffalo on August 30, 1927, the day before the meeting of the American Bar Association, where various subjects of importance were discussed such as: rule-making power, judicial councils, state bar organization, co-operation between press and bar, and requirements for admission to the bar. Representatives of this Association were Mr. Stoughton Bell and the Secretary. No action of special interest was taken, but the subject of compulsory state-wide bar organization, which was the subject of a vigorous controversy and emphatic vote at the meeting of the conference in Washington on April 28, 1926, was again debated, a portion of which appears in the "American Bar Association Journal" for November, 1927, pages 670–671. In addition to what there appears, the suggestion was made that somewhat more emphasis should be given to keep before the members of the conference at each meeting the exact phraseology of the resolution adopted in April, 1926, at the meeting referred to as follows:

> "RESOLVED, that this Conference of Bar Association Delegates recommends to the various state and local bar associations throughout the United States that compulsory, all-inclusive incorporation of the bar is a matter that should primarily and properly be determined by each state, in accordance with its own existing conditions and its own traditions."

No action was necessary on this suggestion as Judge Goodwin, chairman of the committee on this subject, explained that the work of the committee was in accordance with that resolve. The representatives of this Association felt it important, however, that the terms of the resolve should be kept clearly before the members of the conference from year to year.

An important report on the subject of co-operation between the press and bar was presented by Andrew R. Sheriff, Esq., of Chicago.

The Grievance Committee recommended that one case be brought to the attention of the court. The report was submitted to members of the Executive Committee and the recommendation approved.

Messrs. Reginald H. Smith, Raynor M. Gardiner and others requested the Executive Committee to authorize the appointment of a special Committee on Legal Aid. Mr. Smith's letter was submitted to members of

the Executive Committee who were divided upon the proposal, most of them wishing to hear more about it. Since the subject was thus submitted to the Executive Committee, further developments have taken place in the legal aid situation in Massachusetts which are described in the following letter from Mr. Smith:

DECEMBER 14, 1927.

Secretary Massachusetts Bar Association.

DEAR SIR:—

Since my last letter requesting that the Massachusetts Bar Association appoint a special Committee on Legal Aid Work an interesting development has taken place.

Last Saturday there was formed the Massachusetts Legal Aid Association, composed of the present legal aid offices in our state. They have united to exchange experience so that the older offices may help the newer, to promote co-operation when cases have to be handled or investigated in two or more cities, to confer about the administration of justice, especially in the lower courts, and to urge remedial measures, and finally to work out a method whereby cases requiring legal aid in smaller communities may be referred to local counsel who will accept such legal aid work.

It is earnestly desirable and mutually advantageous that the organized bar and organized legal aid work should stand in close relation to each other. Legal aid work is integrated with the national bar through the standing Legal Aid Committee of the American Bar Association. For state purposes the State Bar Associations in New York, Connecticut, Pennsylvania, Illinois, Ohio, Michigan, Louisiana, and California have legal aid committees.

I respectfully request that your Executive Committee appoint a legal aid committee of three to assist in all proper ways and generally to co-operate with the Massachusetts Legal Aid Association.

Sincerely yours,

REGINALD HEBER SMITH.

In accordance with the by-laws, the following persons were admitted to membership by the Executive Committee after approval by the Committee on Membership since the last annual meeting:

Asa L. Allen, 45 Milk St., Boston.
Henry R. Atkinson, 70 State St., Boston.
Russell L. Davenport, Gaylord & Davenport, Holyoke.
Thomas R. Hickey, 59 Main St., Northampton.
Frank W. Knowlton, 30 State St., Boston.
Arthur J. Young, 314 Main St., Worcester.

Respectfully submitted,

F. W. GRINNELL,
Secretary.

[The report was accepted and ordered placed on file.]

THE PRESIDENT.—There is a request that the Massachusetts Bar Association appoint a committee of three to represent the bar in legal aid work. What is your pleasure in reference to it?

SECRETARY GRINNELL.—I think it might be well to refer it to the Executive Committee. I asked Mr. Marr of the Boston Legal Aid Society to come down here to explain in more detail the organization of this Legal Aid Association and give us a more definite idea of what this plan means to be submitted to the Executive Committee. Mr. Marr is here and we can hear him after the reports are dealt with.

REPORT OF COMMITTEE ON JUDICIAL APPOINTMENTS.

DECEMBER 15, 1927.

The Committee on Judicial Appointments has considered the vacancies on the bench as they have occurred and have offered to assist the Governor with suggestions if he wished to receive them. When requested by the Governor, your committee has submitted the names of men whom they believed to be fitted for the position.

Respectfully submitted,

T. W. PROCTOR,
Chairman.

[The report was accepted and placed on file.]

THE PRESIDENT.—You have heard the report of the Committee on Judicial Appointments. Of course the report does not state how many times the Governor has followed the suggestion of that committee. Having been on a similar committee in earlier years I have my opinion as to the probable result of those interviews. I don't know but it is quite as well that the report should not state the number of times they have made a recommendation, but perhaps, in the case of coming committees on Judicial Appointments, it might be well to put into the record whether the Governor has in a single instance accepted the recommendation made by the committee, because if the report should get to the Governor he might notice it. My own observation has been that very little attention is paid to recommendations and I think it is rather rare that the Governor has asked the advice of the Committee on Judicial Appointments. It is perfectly plain, however, to all of you gentlemen, and, especially so to the older members, that if appointments are to be made without a consideration of the Massachusetts Bar, a valuable aid is lost in the appointments. It goes without saying that the Massachusetts Bar Association knows the Bar of the Commonwealth, whether they are members of this Association or not—knows them thoroughly, knows their fitness, all of their qualifications; and we appreciate that it means something more than a mere knowledge of

the law. It means too many things for me to begin an enumeration of them. I have felt for years that the Massachusetts Bar ought to have an important part in the naming of the members of the judiciary. Of course, I am not expected to say that if I had been upon that committee there are some men on the bench already whom I would not have recommended. I am not expected to say that, therefore I do not say it. But it seems to me if we are going to maintain the high standing of the judiciary of the past, there have got to be some active measures taken in the selection of men, who, so far as the Bar knows, are going to fill the bill plus.

Of course, we cannot make any comment about the existing bench or benches. This last year we have survived and finished a trial that was begun nearly seven years ago, and the reputation of Massachusetts outside of Massachusetts, and somewhat inside, if we are to judge by the comments of colleges, has lost somewhat of its prestige in public opinion. I do not know that that is confined to this country. I judge, by reading the papers and by some questions which were asked of me while I was abroad, that it is not confined to this country. That I know. However, I think we can safely say that we know that that situation could never happen again.

It is not for us to speak of the judges that we have now. They are all doing the best they can. I should not be inclined to criticise a single judge. But I do say, and I say it with emphasis, that I think it is the duty of this Association to take a stronger hand hereafter if its influence would be recognized or heeded by the Governor in the selection of the best men for those places.

Now that brings to consideration another matter. I had intended to say nothing about this, but I am rather invited to it by the suggestion with which I started. We have had some men who have been excellent for the position, who, by reason of their own financial condition, could ill afford to take a place upon the bench. That is particularly true of the Superior Court. I think Mr. Nutter stated a year ago in his report to the Boston Bar Association that in one of the recent appointments there had been suggested, with what would be characterized as substantial endorsement, seventy-three men who might be called, in a way, candidates for the Superior bench. I may be wrong in the number.

MR. NUTTER.—Seventy-seven, I think.

THE PRESIDENT.—Seventy-seven; I thank you for the correction.

Now that, of course, is a situation that is wrong, because many of those men—I cannot say all, but many, very many—were receiving endorsements from friends in the nature of political endorsement. And when the appointment of judges of Massachusetts becomes a matter of political appointment, we may well say, "God save the Commonwealth of Massachusetts".

I did not intend to say this when I began.

The next is the report of the Committee on Legal Education.

REPORT OF THE COMMITTEE ON LEGAL EDUCATION.

To the Secretary of the Massachusetts Bar Association:

I report that there has been no meeting of the Committee upon Legal Education during the year. The Chairman has followed up various matters of interest and especially matters with reference to the Bar examinations. He was called into the conference between the Bar Examiners and the Suffolk County Committee upon character, concerning the situation which has resulted in the justified but deplorable resignation of that Committee.

There are likely to be developments arising out of this which will make the Committee upon Legal Education more active in the coming year.

Respectfully submitted,

RICHARD W. HALE,
Chairman.

DECEMBER 16, 1927.

[The report was accepted and placed on file.]

THE PRESIDENT.—The next is the report of the Committee on Legislation; Mr. Nichols.

REPORT OF COMMITTEE ON LEGISLATION.

The report was read by Mr. Philip Nichols, Chairman of the Committee.

To the Members of the Massachusetts Bar Association:

At the annual meeting of the Association, held at Worcester, December 18, 1926, the Second Annual Report of the Judicial Council, which had been filed November 30, 1926, was the subject of some discussion, and it was finally unanimously voted that the Association sympathized with the report and that the report be referred to the Committee on Legislation, with full power to act and with the recommendation that the Committee support before the General Court such parts of the report as, after study, it decides to give its full approval.

The Committee on Legislation consisted of the following members: Philip Nichols, of Newton, Chairman; J. Colby Bassett, of Boston; Dunbar F. Carpenter, of Winchester; Lawrence Curtis, 2d, of Boston; George P. Drury, of Waltham; Lee M. Friedman, of Boston; Thomas J. Ham-

mond, of Northampton; John E. Hannigan, of Cambridge; Arthur D. Hill, of Boston; Oscar A. Marden, of Boston; Charles Mitchell, of New Bedford; Daniel T. O'Connell, of Boston, and Robert Walcott, of Cambridge.

The Committee held a number of meetings, which were well attended, and at which all of the recommendations of the Judicial Council were analyzed and discussed. On January 22, 1927, the Committee held a public meeting at the Suffolk County Court House, to consider the recommendations of the Judicial Council to which all members of the Association and members of the Bar generally were invited; and members of the Bar were publicly urged to submit to the members of the Committee, individually or collectively, their views on the problems raised by the report of the Judicial Council.

The Committee, in carrying out the vote of the Association, submitted to the Joint Committee on the Judiciary of the General Court, to which had been referred the recommendations of the Judicial Council, two communications, the material portions of which are as follows:

JANUARY 26, 1927.

* * * The Committee (on Legislation) of the (Massachusetts) Bar Association has considered the Second Report of the Judicial Council and thoroughly approves and heartily supports certain of the recommendations of the Judicial Council, as follows:

That the sittings of the Superior Court be fixed by rule or order rather than by statute.

That the form of writs be modified.

That nominal or chip attachments be abolished.

That the opinions of lower courts be transmitted to the Supreme Judicial Court.

That the Superior Court have power to reserve Workmen's Compensation cases for the Supreme Court.

That private conversations between husband and wife be admissible in divorce and separate support cases.

That witness fees in the District Courts and before masters and auditors be the same as in the Superior Court.

That the standard of education for admission to the bar be regulated by the Supreme Judicial Court.

That inquests be held only in the discretion of the court.

That the jurisdictional limits of the District Courts be removed.

That a third special justice should be provided in District Courts serving a population of over 100,000.

That the Secretary of the Judicial Council should receive compensation for his services.

The recommendation that the statute providing that justices of the District Court might sit in the Superior Court be made permanent was approved to the extent that the statute be extended for a term of five years.

JANUARY 31, 1927.

The members of the committee appreciate the time and study that have been devoted by the Judicial Council to the problems under consideration and they realize the wide experience of the members of that body, and they consequently hesitate to question any of its conclusions; nevertheless they feel that it was the intention of the Massachusetts Bar Association that this com-

mittee should exercise and express its independent judgment on each of the recommendations of the Judicial Council, rather than act as the means of throwing the influence of the Massachusetts Bar Association in favor of the recommendations as a whole, on the assumption that the careful and well-considered study of the eminently qualified members of the Judicial Council must necessarily have led to sound conclusions; and they have accordingly considered each proposition on its merits without allowing the approval of the Judicial Council to influence their conclusions. They have reached the following results:

(1) The committee approves the recommendation of the Judicial Council that juries may be waived in criminal cases. Mr. O'Connell dissents, on the ground that many defendants might waive their constitutional right to jury trial without fully realizing what they were doing, and in the belief that justice is better administered in criminal cases through the established system of trial by jury.

(2) The members of the committee unanimously approve in principle the recommendation of the Judicial Council that minor violations of the motor vehicle laws be treated as other than criminal offenses, but are not entirely in accord with all of the details of the method of reaching this result advocated by the Judicial Council. They believe this matter is one requiring prompt and immediate action by the Legislature, and urge the Committee on the Judiciary to give the recommendations of the Judicial Council and recommendations to the same end by others most careful consideration in order that it may evolve the most satisfactory method of meeting this troublesome situation.

(3) The committee approves the recommendation of the Judicial Council that the disciplining of attorneys for professional misconduct be placed in the first instance in the hands of officers appointed by court. Mr. Mitchell, Mr. Drury and the chairman dissent, on the ground that it would be unwise to give official standing to groundless complaints against reputable attorneys.

(4) The committee approves the recommendation of the Judicial Council that the method of stating evidence in bills of exceptions in question and answer form under certain conditions be adopted, subject to the following qualification. The Supreme Judicial Court has hitherto consistently insisted that the statement of evidence in bills of exceptions be reduced to narrative form. It is well known that the labors of that court have increased to such an extent as to tax the capacity of its members to the utmost, and the members of this committee are unwilling to support any legislation which will make the duties of the members of that court still more onerous, even if the labors of counsel will be correspondingly relieved. Unless, therefore, it shall appear that this recommendation has the approval of the Justices of the Supreme Judicial Court, it does not have the approval of this committee.

(5) With respect to the recommendation of the Judicial Council that the fees of the Clerks of Court be increased, the members of the committee have taken the following positions:

They do not believe that public policy requires that the offices of the Clerks of Courts be supported by the litigants. The maintenance of courts is one of the primary functions of government, and the existence of courts in which justice will be administered when the occasion arises is for the benefit of the public as a whole, and not merely for the benefit of those who, often through no fault of their own, are from time to time the litigants in such courts. The public as a whole should pay for the courts, and only such fees should be imposed as will tend to ensure on the part of litigants a serious intention to use the courts for legitimate purposes and

will discourage frivolous litigation or frivolous use or abuse of the judicial process in any form.

The majority of the committee believe that in view of the change in the purchasing power of the dollar since the present fees were established, a general increase in the fees of Clerks of Courts should now be authorized. Mr. Hammond and Mr. O'Connell dissent.

The members of the committee do not approve an increase in the price of writs, or an entry fee in the Supreme Judicial or Superior Court in excess of $6.00 in the case of actions of law, or in excess of $10.00 in the case of bills in equity. Mr. O'Connell does not approve of any increase in entry fees.

(6) The committee, with some hesitation, approves the recommendation of the Judicial Council, that appeals to the Supreme Judicial Court from Appellate Divisions be allowed only in the discretion of the Supreme Judicial Court. Their hesitation is due to the fact that this class of appeals does not appear to have yet become so numerous as to unreasonably burden the Supreme Judicial Court. As it further appears that in the great majority of cases the Appellate Division is sustained, if the other recommendation of the Judicial Council that the opinion of the lower court be transmitted in all cases to the Supreme Judicial Court is adopted, such cases if involving no new and difficult points of law could be disposed of by the Supreme Judicial Court summarily by a per curiam opinion approving the decision of the Appellate Division. Mr. O'Connell dissents from the vote of the committee, on the ground that the statute establishing the Appellate Division was enacted by the Legislature on the assurance by those who supported it, of which he was one, that defeated litigants would have an unlimited right of appeal to the Supreme Judicial Court, and he feels that to support the present proposal would be a breach of faith on his part. He also feels that the matter should be deferred until the whole subject of intermediate court of appeal is given consideration.

(7) The committee approves the recommendation of the Judicial Council that defendants in criminal cases in the Municipal Court of the City of Boston should be obliged to choose between final trial in that court and trial by jury in the Superior Court. Mr. O'Connell dissents, for the reasons stated in connection with the waiving of jury trial in criminal cases, and for the further reason that in his opinion one of the evils against which this bill was aimed, namely, the congestion of the Superior Court by appeals intended for delay, has been already cured, in Suffolk County, at least, and can be cured in every county by providing an adequate staff for the District Attorney and a sufficient number of sessions of the Criminal Court, which can be secured by calling up such District Court Judges as are needed.

(8) The committee approves the recommendation of the Judicial Council that debt collecting be separated from controversial litigation.

In the cases in which the committee has not been unanimous, I have stated the views of the minority at length. In most of the instances in which the majority supported the recommendations of the Judicial Council, they were influenced by the same considerations which led the Judicial Council to make the recommendation, and which are set forth in the report of that body, and repetition of this material would be unnecessary.

The Committee was represented at the hearings of the Committee on the Judiciary and the foregoing views personally presented. With the

closing of the hearings its action on the matter referred to it was completed.

Respectfully submitted,

PHILIP NICHOLS,
Chairman.

THE PRESIDENT.—You have the rather full report of the Committee; it is certainly interesting. Is there any discussion of it desired by any of the members present?

MR. MANSFIELD.—Mr. President, there are a few things in the report that I would like to speak about. I think the report does not use the word accurately when it speaks of the clerks' fees. That looks as though the clerk is supported entirely by fees. Those fees are statutory fees paid to the public treasury. I do not think they ought to be referred to as clerks' fees.

Then it speaks of approving the report of the Judicial Council as to removing the limit of jurisdiction of the lower courts. I do not think the Judicial Council did that. We recommended extending the jurisdiction in civil cases by removing the limit of the *ad damnum*, so that the plaintiff could bring suit for any amount in the district court and if the defendant wished to try the case there he could leave it; if he did not, he could remove it. I think that was the extent of the so-called removing of the limit of jurisdiction. As I remember the report, I think nothing was said about jurisdiction in criminal matters, so that that remark about removing jurisdiction was a little too comprehensive.

Then one other matter, on bills of exceptions. The Committee is in favor of the recommendation of the Judicial Council that the summary, or narrative, form be abolished and the entire record go up, provided the justices of the Supreme Judicial Court favor it. I think we may say now that they will not favor it. I think they will not favor it anyway. It seems to me that that recommendation of the Judicial Council ought to be considered upon its merits, whether the Supreme Judicial Court might favor it or not.

I think the reason that the Supreme Judicial Court might not favor that would be because the members would think they would be compelled to read a great long record of questions and answers, many of which would be cumulative and unimportant. But I think, as it worked out in practice, it would not come to that. For example, I think that counsel in their briefs or in their verbal arguments before the full court would point only to those parts of the record that are important, and those would be the parts that the

justices of the Supreme Court would be required to look at. It does not mean at all that because the entire record goes up, the members of the Supreme Court would have to read every word in the record. It would only mean that they would read those parts that counsel thought necessary for them to read. It is also possible for counsel, before the record is printed, to agree among themselves that a great deal of it may be eliminated. Some witnesses whose testimony was unimportant might be left out. So I think the passage in the report recommending that the Association approve provided the Supreme Judicial Court approves of it is rather condemning it to the limbo of forgotten events in advance.

THE PRESIDENT.—Any other comments on the suggestions contained in the report?

SECRETARY GRINNELL.—I would like to add a word to what Mr. Mansfield says about that matter of the narrative bill of exceptions. I think also that the report of the Judicial Council was based upon what is apparently the judgment and experience of some other appellate judges—that they find it easier in the long run to read a question-and-answer record exactly as the case happened down below than they do to read and to grasp the facts in a narrative form of a canned variety which may or may not differ from the case as it appeared below because of the method of statement. I know that some appellate judges in other jurisdictions feel that they can grasp a record very much more quickly in question-and-answer form, no matter what its length, than they can in the narrative form.

THE PRESIDENT.—Any other suggestions about the matters contained in the report? What is your pleasure with reference to the report?

MR. FRANK H. BURT.—From my experience of thirty-five years as a court stenographer, beginning in this county, I am heartily in favor of doing away with the narrative form of record in bills of exceptions. The preparation of the bill of exceptions in this form is one of the greatest sources of delay in getting a case ready for the Supreme Court. Repeatedly in my experience it has happened that counsel have tried to get along with as little of the record as possible, hoping thereby to save expense. The way it works out is something like this: Today the plaintiff's direct examination is ordered. A week later the other side insists on having the cross-examination. After another week the excepting party comes back and calls for the testimony, perhaps, of the motorman, if it is a trolley accident; and then after two or three weeks more,

there is a call for just two or three questions and answers in the middle of the cross-examination of one of the passengers on the car, and, last of all, somebody discovers that the judge's charge must go in in full. Now with the stenographer required to be actually taking notes every day of the court year (the outcome of a statute passed the present year), and with the demands upon him to furnish extracts in cases actually on trial, there are unavoidable delays in the writing out of these extracts and the settlement of the bill of exceptions is hindered accordingly. Under these circumstances the time consumed by the lawyers in preparing the bill of exceptions must often run up into a much larger figure than it would have cost to write out the entire testimony in the first place. If the entire record is ordered transcribed immediately after the trial (omitting such portions as may be agreed to be immaterial) counsel can then go ahead with the preparation of their briefs as soon as the copy is delivered and save all the time that is now consumed in boiling down the testimony and getting up the bill of exceptions.

With the cutting out of the narrative form system there should also be abolished the printing of the record. The idea that everything must go to the Supreme Court in printed form is simply a survival of the old custom which existed before the day of typewriters. At that time, of course, printing was the only method of presenting the record in legible form. Today there is no excuse whatever for keeping up the old practice. The printing of records covering thousands of pages is an inexcusable waste of money when a typewritten copy would serve every purpose. There is no need of having a copy of the record for every member of the Court, for I believe—though this may be a state secret—that the Court assigns the task of reading the testimony to a single one of their number.

The late Judge Putnam of the Federal Court, in an article in "The Green Bag," some years ago, related what he believed to be the cause of delay in bringing cases to the appellate court. It was simply, he said, the fact that counsel had to wait so long for the stenographer's transcript. The stenographers were much overworked, so it was only to be expected that delays would occur. Then he went on to tell of two long cases tried in his court, in which delays of from one to three years took place before the bills of exceptions were allowed and the cases ready for argument—all on account of the overburdened stenographers. His theory was spoiled, however, when a member of the stenographic firm which reported the cases in question looked up his records and found that in both

trials full daily copy was furnished and the complete record was in the hands of counsel as soon as the case was concluded in the trial court. The whole delay was caused by the boiling-down process and the wrangles in getting up a bill of exceptions that both sides could agree to.

THE PRESIDENT.—Any other comments or suggestions? If not, a motion to accept the report is in order.

[The report was accepted and placed on file.]

SECRETARY GRINNELL.—I have no report here from the Grievance Committee. Mr. Forbush, the chairman, has been ill and Mr. Gardner, the secretary, has been out of town. Accordingly, that report will have to be received later.

MASSACHUSETTS LEGAL AID ASSOCIATION.

THE PRESIDENT.—The matter with reference to the subject of legal aid was deferred in order that we might hear from Mr. Marr before any action was taken. Mr. Marr.

MR. VERNON W. MARR.—The Massachusetts Legal Aid Association, as it is known—that is the name we picked out only a week ago—is a firing line organization. That is, it is composed of the men who are actively engaged in legal aid work. We have not called on you gentlemen for guidance to any great extent. The four organizations existing in Massachusetts at present are the Boston Legal Aid Society, the Springfield Legal Aid Society, the New Bedford Legal Aid and the Harvard Legal Aid Bureau. That is a pretty thin representation from the whole State of Massachusetts. We constantly have to find a hit-or-miss system, looking for some lawyer in other parts of the State to handle a case. Perhaps down in Taunton some matter needs to be handled, or down here in Plymouth. I have a friend here in Plymouth to whom I have referred cases. Out in Orange, Massachusetts, perhaps we have to refer a case. That is the experience of the Boston Society, the bigger agency. But if the man in Plymouth here has a case in Orange, Massachusetts, what is he to do? He is not so apt to know anybody in other parts of the State as we are in the central agency where we have gathered some information about others who will co-operate with us.

To meet that situation we have started a legal aid association of state agencies. We do not expect that the smaller towns are going to have legal aid societies. It does not seem to work in the smaller towns. The city of Worcester, we feel, ought to have a legal aid society. They tried it a few years ago and President Young of the

Worcester Bar Association said it failed. We have felt that that was due, perhaps, to a feeling of lawyers locally that it was competing. But Springfield is very successful with its society, which is due to the fact that they have a capable man, Richard J. Talbot, who is a prominent lawyer. He is successfully handling it, and if towns and cities will get men of that caliber whom they can trust absolutely, they can have a legal aid society right in their town. The smaller places will have to have just a committee or a lawyer, or perhaps they will use a family welfare association. In fact, in the city of Chicago, which is not so small, the Legal Aid Society is a part of the United Charities of that city. In Philadelphia there is a city bureau which is a public bureau for this purpose. St. Louis has a small one. Boston might well consider taking over some of the work of the Boston society, which is really state wide. That is a point I wanted to bring out here, that the Boston Legal Aid Society, being in a metropolis, is doing work for people all over the State—in fact, all over the country and over the world. People in Europe having cases here write to us. We had a case in Florida that we had a chance to settle; a lawyer who had to go down there on some business handled this very efficiently for us at a small charge. We do business for small charges; that is the Massachusetts policy. In a City Bureau, like that in Philadelphia, they do not charge anything. In San Francisco a private society does not charge anything. But we believe the best way is to require everybody to pay something and not pauperize the poor person whom we are trying to help.

Now what we want here is to get some co-operation and the experience of you older people in the practice of law and men who are interested in public welfare.

Just how can we further this cause throughout the State? We feel that we would like to get lawyers in various parts of the State to say that they will undertake to handle anything that comes their way or they will see that it is handled properly—anything referred to them by the Boston Society or the Plymouth representative or local associate counsel or whatever he may be. We have made a start on that by inviting a few lawyers whom we knew in towns throughout the State to co-operate. We are sick of the hit-or-miss proposition—the idea of somebody saying, "Go and see Lawyer Bill Jones; he is a good fellow; he'll handle your case." No doubt he will do it as a matter of friendship for the man who refers you to him, but it is not fair to impose on the best-natured lawyer in

town who is paid by private clients to handle their affairs and not to be handling affairs for which he is not paid. It does not pay the man who handles them and he has to make himself whole by his charges to somebody else. Of course, a man who is paid can handle a case much more efficiently for the sake of the client and for the sake of the money concerned than is done under the hit-or-miss plan. We hope that you will find some way such as through the appointment of this committee to co-operate and localize legal aid—not conflicting with the Boston Society or putting on that Society the work of the entire State.

THE PRESIDENT.—Any questions of Mr. Marr?

MR. MARR.—I might say that I brought down here some reports of the Boston Legal Aid Society and some copies of an editorial in the "Boston Transcript" on "Justice 'Longshore", which tells you about the new Federal Board which handles cases of longshoremen injured while working on sea-going ships, a class of workers who had no right to compensation for injuries before this time. If you would like them these copies will be distributed at the desk.

THE PRESIDENT.—Having heard the explanation by Mr. Marr, what is your pleasure with reference to this matter? Will there be any action taken toward appointing a committee as suggested in the letter of Mr. Smith, or will it be referred to the Executive Committee for the coming year?

[On motion, it was voted that the matter be referred to the Executive Committee.]

ELECTION OF OFFICERS.

THE SECRETARY.—Mr. President, the report of the Nominating Committee appears on the back of the notice of the meeting.

The report was read and a ballot being taken the persons listed at the beginning of this report were duly elected.

DISCUSSION OF RECOMMENDATIONS OF THE JUDICIAL COUNCIL.

THE PRESIDENT.—The first matter for discussion contained in the notice of the meeting is:

First, the recommendation of the majority of the Judicial Council that the requirement of single justice sittings of the Supreme Judicial Court be abolished and that court be relieved of all its *nisi prius* jurisdiction except admission to the bar and disbarment or other discipline of attorneys, leaving such prerogative writs as are incidental to its supervisory jurisdiction over other courts

and in the nature of appeals to be dealt with by the full bench. The discussion of the problems of the Supreme Judicial Court and the reasons of the majority of the council for this recommendation together with Mr. Mansfield's dissent will be found in the report, pages 43–57.

Is there anything to be said—there probably should be a great deal said—upon this first matter for discussion? [After a pause.] I can hardly believe that silence gives approval, even in this instance.

MR. EDWARD F. MCCLENNEN.—I move you that the Association approve the recommendation of the Judicial Council that you have read and request the incoming Executive Committee to support it. [The motion was seconded.]

THE PRESIDENT.—It is moved and seconded that this meeting approve of the recommendation of the Judicial Council and that the incoming Executive Committee be requested to support it—I assume before the committee of the coming Legislature. Is there any discussion upon this matter?

MR. PHILIP NICHOLS.—It seems to me, in view of the undoubted overburdening of the justices of the Supreme Judicial Court in their appellate work, that this measure should be adopted unless it can be fairly said that in their *nisi prius* work they are doing something which no one else can do equally well, or that there are matters of such importance that they ought to be left entirely to the Supreme Judicial Court, not left with the Superior Court or some other tribunal. Now if one attends frequently the sessions of the single justice of the Supreme Judicial Court in Suffolk County, he will find that the matters before the court are not of greater importance than many that come before, let me say, the equity session of the Superior Court. There are struggles under a writ of mandamus over whether a minor official of some city or town was properly appointed or properly removed, and a great many more or less trivial questions. The questions of corporation taxes which take up some time of the Supreme Court are important enough, but they are no more important, if they are as important, as the local taxes which are passed upon by the Superior Court. So that one who attends a session of a single justice of the Supreme Court is not impressed with the gravity and seriousness and great importance of the litigation. While we would regret in a way not to have the prerogative writs passed upon in the first instance, perhaps, by a single justice—that might clear the atmosphere somewhat in getting

them before the full court—I think in view of the overburdening of the court in its appellate work there would be no serious loss in giving up the *nisi prius* work, and I should, therefore, personally favor it.

THE PRESIDENT.—Does anybody else desire to be heard in favor or against the recommendation of Mr. McClennen?

MR. MANSFIELD.—Mr. President, I suppose, since I have a dissenting report on this topic, that I am expected to say something. I think that I have said about all there is to be said that I can think of, anyway, in that report, and I wonder if it is a fact that everyone here has read it. If they have I don't want to read it. If they have not I would like to read it, so that at least the other side might be before the organization before a vote is taken.

In reply to what Mr. Nichols has said, this observation occurs to me: If we appear now before a single justice of the Supreme Court in a *nisi prius* sitting in Boston, we can at least get a hearing and we can get it before a judge who is on the bench. He will listen to the testimony; the clerk will swear witnesses and they will be called and they will testify *viva voce* before the presiding justice. There is no corresponding session in the Superior Court where that can be done. The nearest approach to that session in the Superior Court is the equity motion session, and I will defy any lawyer practicing at the Boston Bar or at the Massachusetts Bar anywhere to get any witnesses heard in that session now. Only a few years ago the court would hear short matters and would hear some testimony; but now the judges say, and I dare say truly, that they are so pressed with work and the lists are so long and they have so much to do that it is utterly out of the question for the judge there to hear any testimony; so that if these cases are to be transferred to the Superior Court, some new machinery must be provided in that court.

I do not agree that the matters that come before the Supreme Court are of no more importance than those that come before the Superior Court now. In the Supreme Court *habeas corpus* matters have the right of way. They go to the head of the list. I suppose the reason for that is that they are assumed to be important cases, and that if a citizen were confined illegally in any institution or by any person, the very earliest moment that that person could be restored to his liberty was such an important matter that it should take place at the head of the list. If those cases should be sent to the Superior Court as it is now constituted, and to the motion ses-

sion of that Court, I don't know what would happen to them. They might take precedence of other cases at the head of the list and be called first, but I doubt very much if the court would hold up everything else to hear testimony in those cases. There would have to be another session, I suppose, or some other method provided.

Now I would like to read this dissenting report. It is not long, but if everyone here says he has read it I will not read it.

THE PRESIDENT.—They do not seem to say so, Mr. Mansfield.

MR. MANSFIELD.—Well, here is what I say:

[Mr. Mansfield read his dissenting report, contained in pages 48 to 52 of the MASSACHUSETTS LAW QUARTERLY for November, 1927.]

THE PRESIDENT.—Mr. McClennen, this was your motion; have you anything to say about it?

MR. MCCLENNEN.—I don't know that I have anything that would add to what the Judicial Council has said on the subject. The relief to the Supreme Judicial Court, I judge from the report of the Judicial Council, would be rather more in its total effect than it seems to have impressed Mr. Mansfield. It may be that it will be necessary to have more provision for time in the Superior Court if the matters now dealt with by a single justice in the Supreme Court are transferred there. It seems, as one observes the sittings of the single justice, as if a very considerable part of them were taken up with matters that are no more important than those being dealt with in the Superior Court, and many of them less important. One illustration—of course it is not fair to press it too far—one goes in there and hears the treasurer and clerk of a really defunct corporation take the stand and testify that the corporation has paid all its debts, wants to go out of business, and no one is known who has any objection to its being dissolved; and then I think the court officer inquires of the walls and galleries whether anybody has been found who will oppose this motion. That is, of course, one of the marked illustrations. It is something that might well be taken care of by the court officer himself without the judge, or certainly by the clerk of the court.

As soon as you say *habeas corpus*, of course, it makes one stop and think right away. I suppose the reason we now have hearings on facts in support of applications for that writ in the Supreme Court is because it is self-evident that that is the kind of matter that cannot be dealt with by delegating it to some other tribunal to determine the facts. And undoubtedly, if that jurisdiction were in

the Superior Court that court would feel the same necessity for hearing the facts in the first instance, rather than referring such a case to an outside officer to determine what the facts are. It would take no more of the time of a Superior Court judge than it now takes of a Supreme Court judge.

One of the difficulties with these various recommendations for changes in the existing practice is that one feature ties in with another. Take this matter which will come up for discussion a little later, I suppose, the matter of abolishing bills of exception. I suppose if the Superior Court had to do all the work that is now done by a single justice of the Supreme Court, that the combined time devoted to that would be less than the time that is now taken of the various justices of the Superior Court in dealing with bills of exceptions, which would be saved if the other recommendation were followed. The difficulty with the situation that exists now is that it is not at all a logical result. It is true that we have got down to the situation that now exists by taking away the more important matters from the Supreme Court. I do not believe that if we were starting afresh it would occur to anyone to put into the Supreme Court the particular things that are now left there. They are simply there because they happened to be placed there at the time that a great many other things were placed there.

The suggestion of Mr. Mansfield that the justices of the Supreme Judicial Court ought to be in closer contact with the members of the bar and with the trial work is, of course, a very important one. The difficulty here is in its application to this particular matter. I do not believe that the contact that the justices of the Supreme Judicial Court get with the bar and the way trials are conducted from day to day out of sitting in the single justice session is worth anything. There is so much of it that is of a very minor character and it is nothing compared in its value to the value that would come if we could have the justices of our court of last resort sitting with juries and seeing from day to day the way trials are still being conducted and could give those trials the atmosphere of the experience and dignity of the presence of the justices of the court of last resort. I think we are not gaining enough from having the single justice sittings continued to equal the embarrassment that it causes to the Supreme Judicial Court in interfering with its other work, and that slight contribution of time for the appellate work we had better make by relieving the court of its present jurisdiction.

THE PRESIDENT.—Anything else to be said upon this motion?

MR. DANIEL T. O'CONNELL.—I have given this matter a reasonable amount of thought in advance of Mr. Mansfield's views expressed in his dissenting opinion, and feel that I should say that so far as I am personally concerned, I support rather strongly the view taken by Mr. Mansfield. It seems to me that the recommendation of the Judicial Council is grounded upon what we all know to be a fact, that the court is now very much overworked; but whether this remedy is the proper remedy is the thing which none of us can determine. The Judicial Council, at page 44, sets forth sixteen different suggestions which have been made for relieving the congestion of business before the court. This recommendation, as Mr. Mansfield has pointed out, seems to me just whittling down some of the work as it has been whittled down in the past. The view I take is this—that it is high time that the bar as a whole meet this one great question as to what is to be done in the way of relieving the congestion which now confronts the court, instead of postponing each year and in succeeding years the determination of this question of how the great volume of work is to be met by the court. I do not think that this little cutting off of work is going to ever solve the question finally.

I think there is much in what Mr. Mansfield has said, that contact with the court through that session is of value. I think and believe earnestly that the ultimate adoption of some one of the sixteen suggestions which are set forth here, and many others which are yet to be made and find expression, will give a relief to the court which will in turn permit of this *nisi prius* work being continued without in any way interfering with the appellate work of the court being done to the satisfaction of the bar and of the court as a whole. I also feel that at this time this particular recommendation should be taken up at some subsequent date when this Association or a committee of the bar and the various bar associations meet the direct question as to what method is to be taken to relieve the congestion and which of these sixteen suggestions or other suggestions will be the feasible method to work out in bringing about that result. Therefore I support for the time being the recommendation of Mr. Mansfield, believing that there is much merit in the suggestion that there is some of the business which could be removed, but not removed as a whole as provided by this recommendation.

MR. GEORGE R. NUTTER.—I have a good deal of sympathy with Mr. Mansfield's point of view, but it seems to me that the real difficulty that we are laboring under in Massachusetts is the structure

of our judicial system. Originally we had one court which dealt with all questions of trial and also all questions of an appellate kind. That I understand to be the fundamental change that was brought about in English procedure and now prevails in England, the appeal to the House of Lords being considered, as I understand, by Englishmen as rather an anomaly. When we departed from one court which should take up all trials and also have appellate jurisdiction, we really met the parting of the ways. We then had a very curious anomaly of two courts, each of which was to deal with trials but only one appellate. It is a perfectly logical conclusion that those two things cannot exist in the ordinary economic way of conducting judicial trials, and we have been sloughing off the work of one court and leaving it as an appellate court until we have got down to the vanishing point. Now if we are to continue to have two courts and not go to the bottom of this thing for a whole structural change, I see no particular reason why we should keep for the Supreme Court this very small part of the trial business. It is not logical. As Mr. McClennen says, it does not bring them into contact with the bar particularly. It does not give them what they would originally have had if they had been able to try cases before juries and in the other branches of the law, and we might just as well get rid of that little bit that remains, much as I sympathize with Mr. Mansfield. Whether we should not go deeper and see what kind of a structure we ought to have in the judicial system is another question.

Mr. H. C. Thorndike (Brockton).—I feel rather presumptuous in addressing this meeting, and yet my practical experience recently in the Superior Court leads me to remark that it would be a delightful change to go before a single justice of the Supreme Court and get an unhurried and earnest hearing of a case. The Superior Court, in this county at any rate, so far as I observe it, is rushed and it is apparently almost as well pleased when it continues most of the cases on the list as if it had disposed of them all, and it congratulates itself on clearing a docket when it has simply refused to hear cases. We have had that situation and I offer no criticism on the justice who has presided at a recent session in Brockton. The more recent the appointment to the bench, to some extent, the more efficient and approachable is the justice there. It is only after a judge has been upon the bench a few years that we have trouble, you might say, in getting hearings on certain things. In Plymouth County it is almost impossible for us to get motions heard and to

get matters taken up in the Superior Court. If a judge has a jury session he will have no time for them, and if he has a jury waived session it is pretty nearly as bad. Court cases and equity cases are almost impossible to hear. It strikes me that the main difficulty with the work of the Supreme Court is absolutely useless bills of exceptions that go up. If you try a case in the Superior Court and the judge does too much for you, you are in a very bad position. The other fellow takes it up to the Supreme Court and down you come again or you settle the case with him. If the judge is wrong in his ruling you are delayed a year or two before you finally get to the end of the case. If there were only some way by which useless and futile and foolish bills of exceptions could be screened between the Superior Court and the Supreme Court, they would not have anywhere near so much to do and they could take their time and hear lots of meritorious cases.

THE PRESIDENT.—Anyone else?

MR. FRED T. FIELD.—It does seem to me that the requirement of some relief to the Supreme Court is so urgent that we ought to take the means which seem to be at our hand rather than discussing some more fundamental things which may perhaps come in another generation. We are told—I don't know enough about the practice in England to make a statement on my own knowledge—we are told that the Lord Chief Justice of England sits in the trial of comparatively small cases. Now it would be ideal if the judges of our Supreme Court sat in the trial of cases very generally if it were possible. I do not believe that it is possible for them to sit in any considerable number of trials and still do their appellate work. The number of trials which have been taken away from them is so great that those left, as Mr. McClennen has said, or as everybody recognizes, in fact, are a very small jurisdiction. Now to take that away will help them somewhat. I understand, according to the Judicial Council's figures, that it will really save the time of one judge. Mr. Mansfield estimates that the saving will be much less. But suppose that not more than half the time of a judge is saved—and it seems to me, if, as Mr. Mansfield says, the judges sit only 250 hours in a year,—yet still the lost motion in coming and going will be enough to use up one-half a judge's time.

Now to save one-half the time of a judge for his work in the Appellate Court is a real saving and should be considered, and I think that that should be done unless there is some distinct gain on the other side. The only gain that is really suggested is the gain in

habeas corpus cases. There is little gain in equity cases; they are all turned over to masters or to the Superior Court anyway. I do not think that there is any point in requiring a case of a public officer or a case of the Commonwealth to be tried in the highest court. I do not think there is any reason why a writ running to a public official from any sense of dignity should be brought in the Supreme Court. I think if the Superior Court is good enough for an ordinary citizen it is good enough for the public officer. I think there is no sense in having corporation tax cases brought in the Supreme Court. We come down to *habeas corpus*. Most of the *habeas corpus* questions are no different from questions which arise in other courts in some other form of procedure. The last time that I was sitting and waiting to be reached in the single justice session the first case was a *habeas corpus*. What was it? It was a question whether a father or a grandfather should have the custody of a young child—distinctly a domestic relations case, and it should be where other domestic relations cases are heard; but because it was in form a *habeas corpus* case it was in the Supreme Court. What is left there is left there not because of the nature of the subject matter, but for some procedural reason. There is no more reason why 99 per cent of those cases should be tried there than other cases. They do not involve as difficult questions of law; they do not involve as difficult questions of fact. You go into a hearing there and if the court is assured that it is a comparatively unimportant and short case it will hear it. If it is not, and if it is a case which it can refer, it will refer it. In other words, the small, unimportant cases, generally speaking, are tried before a single justice. *Habeas corpus* in its essence is a great writ, the greatest writ there is; but it does not involve the liberty of the citizen any more than a criminal trial does, any more than the commitment to an insane hospital does, or any of those proceedings. There is no more reason why the custody of a small child should be tried there because it comes up in a *habeas corpus* proceeding than if it should come up in a divorce proceeding.

The ideal situation would be for the judges of the highest court to sit in important trials. But we cannot have that. We must relieve the court in some way, if possible, and here is a possible way to give them at least the time, it seems to me, of half a judge, or half the time of a judge, which means adding six months in the year to the working time of the whole court. It means giving each judge practically the equivalent of one month's time more to do his work.

I should say that if I were given an extra month to do my year's work, it would be a distinct boon.

THE PRESIDENT.—Does anyone else desire to be heard?

SECRETARY GRINNELL.—As one of the members of the majority in the Judicial Council report, I would like to add a few words as to why I support the recommendation of the majority of the Council. I appreciate fully Mr. Mansfield's point of view and what has been suggested by others, and I have sympathized with some of those ideas in the past. But as Mr. Field says, we are facing a condition and not a theory. The *nisi prius* jurisdiction of the Supreme Judicial Court which now remains is largely there because of procedural reasons rather than because of the nature of the case. There is no case, unless it is of a very exceptional character indeed, which is in the single justice session of that court, which is any more important or as important as the regular jurisdiction of the Superior Court to try, for instance, first degree murder cases. Those are as important as any cases that arise in any court.

It seems to me that the problem is, what is to be done under existing conditions to accomplish what I believe the people and the bar of Massachusetts want in that court, and that is to keep the standard of the appellate work, which can only be done in that court, at its highest possible point. The judges feel overworked. The members of the bar think they look tired. I do not say anything in the way of disparagement of the work of the court, because I think they have met their burdens well. But I do not see how under the present circumstances and procedure, in the present pressure of that court, the appellate work can help suffering.

As I see it, steps should be taken to enable that court to do its best work in the work which must be done by it. We have stated in the report sixteen different suggestions which have been made in regard to the Supreme Court. There may be others, such as Mr. O'Connell suggests, which I do not happen to know of. We stated them in order that the bar and the public could have those suggestions before them, and we have expressed our opinion as to each one of them.

My own belief is that it would be a mistake to enlarge the numbers of the court. The court has stood as a small court and the prestige of that court of one hundred and forty years is one of the biggest assets that the Commonwealth and the people have. Under the development of our history I think the standing of that court as a separate court is of great importance and I think everything should

be done to protect it. I disagree entirely with the idea of absorbing it into a large court and making it an appellate division of a large court. I appreciate the desirability, if it were practicable, of having the appellate judges try cases and bringing them in touch with the bar and the constant trial of cases. I do not believe it is practicable. I do not believe the court gets any value that amounts to anything, so far as I can make out, from its present single justice work. I have tried to see, but I do not see, how they are brought in touch with the people to any great extent through those single justice sessions today. I do not see why the people cannot see them and get in touch with them as much by going into the full bench session and seeing five of them sitting as they could by seeing a single justice sit. Most of the equity business is referred to masters or sent to the Superior Court, and it might just as well be brought in the Superior Court in the first place.

So far as the prerogative writs are concerned—sometimes called extraordinary writs—there is nothing extraordinary about them that I can see. It is simply a traditional name for a writ to deal with a particular set of facts. If the *habeas corpus* cases were dealt with in the Superior Court they could be given precedence there and sent to the equity session at the head of the list just as well as they can be dealt with in the Supreme Court. Both the Superior Court and Probate Court now have jurisdiction in *habeas corpus*. The jurisdiction is not exclusively in the Supreme Judicial Court. The exclusive jurisdiction of the Supreme Judicial Court relates to writs like mandamus, prohibition, *certiorari quo warranto*, etc.

It is perfectly true that if you load things on to the Superior Court you get another problem. But if we are going to keep our Supreme Court and keep it as a small court and have the standard of its appellate work kept up as we all want it kept up, I think we have got to face the human facts involved. Those mean some necessary division of labor, and time for the judges, not only, to grasp the facts in the record, but to consider the opinions in regard to the statements of principles of law as carefully as they know how to do. And under the pressure that now exists on the court, I think there is a pretty common feeling that the court ought to have more time for those things.

As to the amount of time that would be saved by giving up the single justice session, it is difficult to say how much that would be. The only actual time record we have is the one that Mr. Mansfield has referred to, of 251 hours actually spent on the bench. How much

time it takes, off the bench, to deal with the masters' reports, or to deal with questions arising in court, we have no way of estimating, except that the judges, or some of them, have themselves estimated it, in a general way, as the time of one judge. Very likely that may be too high an estimate. But of course the time taken on the bench and off the bench, the responsibility, the effort, the interruption of the other work, one thing or another, does take some time, and the judges do feel, as I understand it, that relief from that work would be a very considerable saving for them.

Those are some of the reasons why I believe in the recommendation of the majority.

THE PRESIDENT.—I did not intend to take any part in this discussion, but I am led to express one view because some of you know that when I have an opinion I do not have the reputation, at least, of being afraid to express it. Sometimes, perhaps, it would be just as well if I did not. I think we all get into that trouble more or less in our experience but I tried my first divorce case before a judge of the Supreme Judicial Court, and I do not think that the public or the participants or counsel missed it at all when jurisdiction was transferred to the Superior Court. Of course, that was before the idea of companionate marriages had ever been suggested, and that may solve the whole problem for all of the courts if it goes far enough. In some places they are pretty near that stage now.

Now the taking away of certain jurisdiction from the Supreme Court has gone on step by step, as Mr. Mansfield says. Personally I do not think there is any attitude of the public in the matter. As a matter of fact, the public will think of the judges of the Supreme Judicial Court exactly what the lawyers think of them, and the opinion will be formed by what they hear among those who are before them, discussing with them, and not by any opinion which they may have formed by being in court. So in my own mind I discard that at once.

It is plain that something must be done and this Association ought to give its united support, if we can ever unite on anything, in solving that problem, and the right solution will have united support. What it shall be at the present moment God only knows! But there will be something done. I have an idea that you have got to strike at the root of this thing, which has not been discussed much today, and that is, that frivolous exceptions go up. Now I do take the time to read some of the decisions—perhaps I ought to say all, because I like to watch the developments and advance in questions,

under the congested conditions in which we are living; and mixed with the interesting questions are a lot which are very uninteresting. And you, of the older men, know when you read those opinions that there are many, many bills of exceptions that should not have gone up. What the winnowing process will be to get real questions only and not frivolous questions before the Supreme Judicial Court, is to my mind the problem. But I think if something can be done there it will have a greater resultant effect than to transfer these other matters to the Superior Court.

I am not much of a believer in the dignity of the things that are left in the jurisdiction of the Supreme Judicial Court. I think all of it can be done just as well and just as satisfactorily in the Superior Court. If the jurisdiction was transferred to the Superior Court, as I think it would be if the Massachusetts bar insisted upon it, that would make an adequate provision for dealing with those things, and by competent judges, too. I do not think we should suffer particularly. I yield to no man in my respect for the Supreme Judicial Court and admiration for it. In order to keep up its prestige, as our Secretary has said, we have got to give them an opportunity of giving their very best. If they have got to write 500 opinions a year and do these other things, it is beyond human nature to do it. It cannot be done and get the best. Personally, I am not a believer in increasing the number of the judges in the Supreme Judicial Court, either. I think we would have a greater pride in keeping the number that they have had so long and take away the unnecessary things, so that they could give their very best to that work which is the highest work and redounds to the greatest credit of any in the Commonwealth of Massachusetts.

Is there anybody else who desires to be heard upon this matter? If not, the motion made by Mr. McClennen was that this meeting approve the recommendation of this Judicial Council and recommend that the incoming Executive Committee endorse that recommendation at the coming session of the Legislature. [The motion being put, there were votes both for and against it.] I think it will be well to put upon record the number that are in favor and the number against, because that also should go to the Legislature with the announcement.

[A rising vote was taken, 16 votes in the affirmative and 3 in the negative.]

[The motion is adopted.]

It has reached the hour for lunch, but I think that possibly we can dispose of the second matter in the notice:

Second, the unanimous recommendation of the council that the full bench should sit in Boston for the hearing of arguments in cases from all counties in the Commonwealth and that at each sitting special days shall be assigned for the hearing of cases from distant counties and that the sittings of the full bench be so arranged through the autumn, winter, and spring that cases may be heard from any part of the Commonwealth whenever the papers are ready instead of the present arrangements which result in delays of from six months to a year or more before argument in many cases.

Is there anything to be said upon this second matter for discussion? I suppose that that would interest more particularly the counties outside of Suffolk. This matter has been discussed many times before.

MR. THORNDIKE.—I move that the recommendation be adopted.

[Motion seconded.]

THE PRESIDENT.—It is moved and seconded that this Association support the second matter which I have just read and recommend that the committee support that, Mr. Thorndike?

MR. THORNDIKE.—Yes, that is what I meant.

MR. HAROLD S. DAVIS.—I see no one here from my home county of Berkshire, so I think, perhaps, it is only fair to say a word from their standpoint, as they have been the chief disturbing element when this matter has come up before.

THE PRESIDENT.—No, Worcester has usually had a great deal to say about that.

MR. DAVIS.—But Berkshire has been active. While my practice has always been in Boston, I keep in touch with the people of Berkshire County enough to be familiar with their sentiments. Everything but politics in the relations of Berkshire is very much closer to New York than to Boston. Anything that looks like Boston swallowing Berkshire tends to stir up a good deal of feeling. I believe it would aid this matter very much from the standpoint of sentiment if it were understood that one of these sittings for the whole Commonwealth would be held say in Springfield. People from Boston and thereabouts need not go up there if they did not want to, but something of that kind to break the fall, as it were, would help matters a good deal and get over the feeling that undoubtedly does exist there, that Boston is absorbing everything.

THE PRESIDENT.—I think there is a provision in the recom-

mendation that the full bench may sit in any county for any particular case or for any particular reason. They may hold sittings outside of Boston if they desire. So that if the bar of Berkshire and of Hampshire and Franklin and Hampden and Worcester combine they might get a sitting up in Springfield, I suppose.

[The motion was carried unanimously.]

THE PRESIDENT.—I think we will adjourn now for lunch at the Samoset.

[Recess was thereupon taken at 1.04 P. M.]

AFTERNOON SESSION.

The members were called to order in the dining room of the Samoset by President Vaughan upon the conclusion of the luncheon.

THE PRESIDENT.—I want to say a few words before we go forward to the discussion of the last item that is upon the notice.

During the last year we have lost some of the distinguished members of the Massachusetts Bar, beginning with Judge Aiken of Greenfield, who died early in January, former Chief Justice of the Superior Court. I cannot say anything in commendation of him in addition to what you all already know and could express better than I. He was a man who had lived close to my heart for a very long, long, acquaintance. In fact, I appeared first before him in 1886 in a case in which he was master. I was associated with Judge Bassett of Northampton and Judge Bond was on the other side. I learned to admire Judge Aiken. I could not help it. From that time on we were good friends, close friends in a way. I think we can all say of him:

> "None knew him but to love him,
> Nor named him but to praise."

And while he might decide a case before him in favor of one side, as he had to, I never heard a complaint of his being unfair; I never heard a criticism of his judgment; and that is more than will be said of most of us who are here when we are gone.

We also lost Mr. Hemmenway of the Suffolk Bar. You men who were close to him will appreciate that he was one of the lights of the Massachusetts Bar and had been for many years. I knew very little of him.

Then follows Fred S. Hall of Taunton, a classmate of mine, an intimate friend of 47 or 48 years, the families intimate; one of the

most dependable, likeable men whom I ever met. There was one thing that stood out prominently in his career at the bar, of which his widow told me within the last three weeks. The one thing which was the pride of his life—and she said she almost thought ahead of his wife and children—was the integrity of his office. He lived with it and he lived it and made it. What more can be said of any man who has gone?

Following close upon his death was that prince of lawyers, Charles F. Choate. This is not the time or the place for me to undertake any encomium. His life speaks for itself and it speaks so well that no man could improve upon it.

And then within ten days, Nathan Matthews. I suppose we have not all known him as you of the Suffolk Bar did know him, and yet I have had more or less acquaintance with him for twenty-five years or more. A man who did not wear his heart upon his sleeve, because his mentality was too busy at work all the time. He left a name that was a credit to the Suffolk Bar and to the Massachusetts Bar Association.

I appreciate that this is hardly the occasion to devote much time to the memory of these men, and yet it seems to me that it is proper that in the activities of the living we should not, when it is so fresh in mind, forget the memory of the recent dead.

Now the third matter for discussion. Mr. Grinnell and Mr. Mansfield, too, I take it, hope that you will have a general discussion to bring out your views. Mr. Grinnell says that he feels that they have been very much helped this morning by the ideas brought out in the discussion. The third matter for discussion is this:

"*Third,* that the requirement of a narrative form of bill of exceptions be abolished and that the typewritten record or printed copy of the typewritten record omitting such parts as counsel may agree to omit, shall constitute the record before the Supreme Judicial Court unless parties prefer to substitute some shorter narrative form by agreement. The discussion of this subject will be found in the report, pages 25–26 (see also 2nd Report, QUARTERLY for Dec., 1926, pp. 35–37)."

I await any suggestions or any motion.

SECRETARY GRINNELL.—Mr. President, I would like to say one word which has been called to my attention by Judge Prest in the form of that statement on the notice. Judge Prest is a member of the Council and he telephoned me the other day that perhaps that question might suggest that the judge was to have nothing to do

with the omissions. I assume that this contemplates if the parties on both sides agree to omit some of the testimony, those omissions will have to be assented to by the judge. That, I take it, is Mr. Mansfield's understanding of the situation, too.

MR. MANSFIELD.—Subject to the approval of the court.

SECRETARY GRINNELL.—Yes, the parties could not omit material matters.

THE PRESIDENT.—Does the Association desire to take any action on this recommendation, by vote or otherwise? I can see many men in front of me who are in constant practice in dealing with bills of exceptions who must have some variable ideas as to this suggestion. Mr. Mansfield.

MR. MANSFIELD.—Mr. President, shall I start the ball rolling?

THE PRESIDENT.—If you will; give it a good boost.

MR. MANSFIELD.—Well, this time, of course, I am in agreement with the other members of the Judicial Council. It has occurred to all of us in the Council, and I suppose it has to every practicing lawyer, that the time lost in the trial of cases is between the verdict and the decision of the Supreme Court, and that most of the delay in that interim is caused by the difficulty that counsel experience in trying to reconcile their differences arising over the form of the bill of exceptions. It occurred to us that if the long, interminable wrangle between counsel over what each one thought ought to go into a bill of exceptions and what each one thought ought to go out could be eliminated, a very long step would be taken towards removing the cause of delay. Also—which is perhaps more important, in the way of relieving the Supreme Court of some of its labors—we think that the printing of the record question and answer will lift the burden on the Supreme Court. We do not think that the Supreme Court is going to be obliged to read every question and every answer. One thing occurred to me, and that was that it might be a most expensive matter for litigants who are not wealthy to be compelled to pay for printing a verbatim record. But I think upon reflection that this will not be found to be true; that the money expended for printing the verbatim record, question and answer, might be much larger in amount than that required to print a record that is reduced to narrative or summary form, yet the expense to the client might not be so great if the time the counsel spend in trying to reduce a verbatim record to narrative form should be charged up against the client. That is to say, if counsel sit down and wrangle over a bill of exceptions for a week or two weeks and

charge their clients a per diem for the time thus spent, it would be much cheaper for the client to pay it to the printer and not to counsel and have the entire record printed. Of course, there are many cases where the clients are not very well off, where undoubtedly that time that is put in by counsel is contributed by the counsel, and perhaps that makes him fume a little more because of the time that he has to spend and that he cannot get paid for adequately. But we think that if the verbatim record should go right up as furnished by the stenographer, we would have a much easier argument and clear the list.

I saw in the paper yesterday or the day before that the Supreme Court at Washington had cleared its docket for the year. Perhaps that is rendered possible in Washington by the new rules, under which every case cannot get on there. A case goes up in preliminary form first, and unless counsel satisfy the court that it is worthy of further consideration it does not get any farther. Perhaps something like that may have to be adopted in Massachusetts. But I think that the printing of the record and going up on it, with, of course, the understanding always that counsel will only call attention to those parts of the record that are important, will save a great deal of time, will not increase the burdens of the Supreme Court, and will eliminate that long delay with the difficulty that all counsel must have experienced in settling the bill of exceptions between themselves.

Now the stenographer's record ought to be enough to go up on. As our official stenographer said this morning, that record of the stenographer ought to be enough as it is, without going to the tremendous expense of printing it. I have a case now—not to be personal about it—but an equity case where issues were framed for a jury. It was tried before a jury and a great many exceptions were saved. I was the losing party before the jury. I tried to get to the Supreme Court upon a bill of exceptions which the statute provided for. I drew what I thought was a fairly comprehensive bill of exceptions, putting in everything I thought the other side was entitled to, then, of course, all that I felt entitled to myself, and then after a tremendous amount of work sent that tentative bill of exceptions to the other counsel. He looked it over and suggested that I ought to have the verbatim testimony of this witness and that witness and the other witness; and the result was that I took the various sheets of testimony that he wanted out of my copy of the testimony, inserted them into the bill of exceptions that I was trying to

have allowed, and sent it up to the court. It was a book over an inch thick. Then that was not allowed. We talked about that and the judge wanted to be heard about it, and finally, in order to save money and to save time, it was agreed that the bill of exceptions would be abandoned and the case would go up on a general appeal, which meant printing the whole record. The record was about 900 pages. I deposited week before last $1,000 with the clerk of the court before that record could be sent to the printer, and I am informed that it will cost probably another $1,000 or $1,200 before that can go up.

Now it seems to me that that is not necessary; that the stenographer, in writing out the record, could write out two or three or four copies at once, and that those could be used as originals and save that $1,000 or $2,000, whatever it may be. I think it is a very important matter and I hope there will be some expression of views on it, because the Judicial Council does not pretend to represent the Massachusetts Bar Association. It makes its recommendations from the best light it can get, and this is one of the sources from which we like to get all the light that we can.

SECRETARY GRINNELL.—Mr. President, I would like to add to that, in regard to the making of these copies. Copies of all the suggestions, and reports, coming before the Judicial Council are made for each member and sent around before each meeting. The public stenographer that makes them makes ten copies at one whack. So it is a very simple matter to get enough copies of the record at one stroke if you use thin paper and thin carbon sheets. It has also been suggested that the photostat process is developed so that it may be used if desired.

THE PRESIDENT.—Who next?

MR. MCCLENNEN.—As far as this matter of printing is concerned, I do not think very much of duplicating the stenographer's copies on the theory of having the different members of the Supreme Court toil with a great mass of typewriting. I suggest, to start discussion if possible on the subject, this method of dealing with the problem: Let the stenographer's record, one copy, be the official record. We know that it is very seldom that very much of the record has to be read. Then require of the—I will call it the appealing party, using that in the generic sense,—the filing of an assignment of errors in the Superior Court and require that that assignment of errors contain a quotation of the portion of the record essential to dealing with that assignment of errors, then have that

printed. The person assigning the errors would hold back on the quantity of what he put into the assignment, with a view to making it as brief and striking as possible. Then against the possibility that he might not get in enough, make provision that the presiding justice should certify to the correctness of the assignments that had been made. The opposing party could then lay before the presiding judge any reasons why this was not a correct statement. I would not have a modification of the assignments allowed, but have the judge certify—and of course the opposing party would draw up for that certificate the parts of the record which were also necessary in order to have the assignment a complete statement of the part of the record that was the subject of the error assigned. The person assigning the errors would be forced in that way to pretty scrupulous care to see that he made a fair selection from the record, because the certificate of the judge that parts of the record had been left out would be a thing which everybody would strive to avoid. I would not want to be noted as having not made a careful statement of the record as far as it was required. Those would be printed and the court would have those. The things printed would then be no more, really, than would be necessary to print in a brief. You would not be duplicating printing. Your brief would then contain reference to the places in the printed record which showed the subject matter which you were going to argue, and you would not find it necessary to make a restatement of that in the brief. That would save all the time that is now taken in trying to reduce the record to narrative form, for the thing that you select for your assignment of error you have got to select when you come to the preparation of your brief anyway; you have got to go over that. The full record would be available to go to the full court if there was any occasion to refer to it. I should think it might be more expedient not to have that full record go up as a matter of course, but be held in the lower court to be sent for when there was any occasion for it. That would be economical in the matter of printing; it would be economical of the lawyers' time in trying to reduce a record to a narrative form, and it would be economical of the time of the Judge of the Superior Court who now has to straighten out the wrangles between counsel if there is dispute as to what is a fair reduction of a question-and-answer record to narrative form.

So far as actual reading is concerned, considering that the Appellate Court does not have to go through all the evidence, I believe experience would indicate that it is easier to read a question-

and-answer record than it is to read a narrative. It is not as though you could venture to write a narrative of a record, putting together all the things that are logically connected. I suppose almost no one thinks in reducing a record to narrative form of attempting to relocate the different parts of the record so as to make it a descriptive narrative. All the reduction in narrative is converting a question half a page long by a lawyer skilled in the use of English, addressed to a man who has come into court, having dropped his pick in the ditch, and he answers "Yes"; and then there is presented to the Supreme Court this beautiful piece of English put into the mouth of the witness who could not possibly have uttered it. The whole meaning it lost. Sometimes it is almost impossible to reduce your record into narrative so that it conveys any idea of what the witness really said.

So far as the starting point of all this is concerned, in the disposing of the bill of exceptions, I hope very much that we will support that. It is a great waste of lawyers' time, a great waste of the Superior Court's time, and I doubt on the whole whether it saves a single hour of the Supreme Court's time.

THE PRESIDENT.—I think I will have to thank you for your courtesy and consideration which you have given me for the last year. I will leave the meeting for further consideration in the hands of my successor, Mr. Nutter.

[The President-elect, Mr. George R. Nutter, then took the chair.]

MR. JOSEPH W. KEITH.—Mr. McClennen's remarks bring forcibly to my attention a personal experience which I had in a recent criminal case with which you are all familiar, in which I was assistant to Mr. Williams, District Attorney for this district, and it became my duty to assist in drawing that bill of exceptions. On the question of time I can assure you that we consumed approximately ten months in that work, giving all available time which we could. Mr. McClennen's last remark, that it is impossible in any form of narrative bill of exceptions to bring before the Supreme Court a true picture of what happens during the trial, is entirely correct. Many of the witnesses in that case were uneducated; some of them were not even able to talk English, and in going over the first bill of exceptions that was submitted to us they spoke in the most perfect English which they never were able to speak or understand; so it became absolutely necessary in that case, as you all know, if you have ever seen that bill of exceptions, to report page after page and

page after page from the record, which could not be correctly portrayed to the Supreme Court in any other way.

Furthermore, on the questions of the admissibility of evidence —and there were hundreds of exceptions—the admissibility of a certain question depended in many instances on some question or on some line of testimony which had been developed four or five weeks before that question was asked. That could not be properly set forth in a narrative form and of necessity was copied from the record. I do not believe that the Supreme Court used any additional time—I had left the office before it was argued, but my impression would be that they used less time than they would have used had we tried to report that in narrative form, because they could go back by reference to the brief to the exact question that was asked, a single clean-cut question, perhaps, on which depended the admission or rejection of some other question.

I think Mr. McClennen's suggestion of the assignment of errors is a necessity, because I know in that bill of exceptions there were several hundred exceptions out of which not more than 15 or 18 were actually argued. So it would be necessary for the party taking a case up to pick out of the total number of exceptions taken during the trial the exact ones which he intended to argue before the Supreme Court. I certainly hope that the Association will go on record as being in favor of giving up the narrative form.

Mr. Harold S. Davis.—I should like to testify as far as I can to my concurrence in all that has been said as to the unwisdom of wasting time, effort and money in this attempt to settle bills of exceptions which, when they are settled, often do not accurately reflect at all what actually took place at the trial.

In the matter of printing, I think I can speak from personal experience in a case in the Supreme Court of Rhode Island, because that was an eye-opener to me, having been brought up as we all have with the idea that nothing could be considered by an Appellate Court except what has been printed. I happened to be counsel in a case which was appealed from the Public Utilities Commission of Rhode Island, which, under their practice, is like an appeal in equity, going up on the whole record. The record was a long one, something like 600 pages of typewritten matter, with a good many exhibits. The Public Utilities Commission sent up their stenographic record with exhibits and it was taken for granted by everybody that that was all that was necessary. Our opponents thought it would be useful to have the record printed, so they did have it

printed at their own expense, much to the surprise of all the Rhode Island counsel. When it came to formulating a brief we asked one of our Rhode Island colleagues to give us one of his own briefs simply as a form that we could give the printer, so that we might have our brief printed in accurate style. He said—and he was a lawyer in active practice—that he had not had one printed in ten years. The Supreme Court of Rhode Island apparently finds no difficulty in dealing with these matters on the original papers, with no printing at all. That seemed to indicate that our traditional idea of printing is more a matter of tradition than one of substance; that it goes back, as someone has suggested, to a time when there were no typewriters and a typewritten record was not available.

As to the assignment of errors that has been spoken of, I think I should like to have Mr. McClennen explain a little further, because I do not quite understand how you would get over the difficulty of an exception on all the evidence, as, for example, upon a motion for a directed verdict. It seems from one or two things that he said—perhaps I did not understand him correctly—that an assignment of errors in that case would not be a mere statement of points objected to, such as you get in the Federal practice, for example, but would come pretty near being in itself a new bill of exceptions and so bring us into some of the present difficulties. Perhaps I misunderstood his views on that point.

MR. MCCLENNEN.—No, I think that the difficulty is greater when the question is whether there was enough evidence to go to the jury. It still enables you to cut down very much of what you would put into your assignment of errors. In the first place, you will travel down through your record and simply mark out to be copied out the particular things which really to your mind bear on the one thing that is the fundamental issue which you are seeking to raise by the motion that you made. You will leave out, then, a great deal that is now put in in the narrative bill of exceptions, of things which are necessary in order to make it a coherent narrative, but not at all necessary to lay out the particular testimony which shows that the motorman did ring the bell or that the switch was set the other way, the particular things which are the essential evidence on which the motion is based. Those would not be put in in narrative form. There would be no intellectual effort at all in that part of it; it would be simply mechanical effort. One of the things that it would do would be to lead lawyers to do their thinking when they were assigning their errors and deciding whether they were going

to the Supreme Court, and do the thinking which they have got to do eventually when they come to draw the brief.

PRESIDENT NUTTER.—Are there any further remarks, brethren? I do not know that there is any motion before us.

MR. MANSFIELD.—Of course in capital cases there was a statute passed in 1925 (Chapter 279) which would avoid the delay that you experienced in your case. In 1925 a statute was passed which provided for this very thing that we are trying to have done now in civil matters. The whole record goes right up in capital cases and it is provided, I think, by the statute, that each day the official stenographer shall furnish a record of all the testimony for that day, so that the next morning when court opens the record of everything that was said the day before is upon the counsels' table and I suppose upon the bench also. When the case is ready there is no delay waiting for the notes to be transcribed. In civil cases the stenographers are so busy that you cannot get your transcript right off, but in capital cases the transcript keeps abreast of the case itself so that the record is ready at the end of the trial and goes right up. The car barn cases, I think, got to the full court within six weeks of the verdict by virtue of that statute. Then that statute was extended to other criminal cases of a serious nature and there is an opening wedge which would seem to make it a little bit easier to sell this idea to the Judiciary Committee of the Legislature.

THE PRESIDENT.—Are there any further remarks?

SECRETARY GRINNELL.—One thing occurs to me. Mr. McClennen suggested that perhaps a single typewritten copy of the full record might stay in the Superior Court. I should think it would be better to have that go up so that it would be there and could be used supplementing the assignment of errors wherever necessary, without sending down to the Superior Court to have it.

MR. MCCLENNEN.—Of course that is a very slight detail, whichever way you do it, but it seemed to me that what we ought to strive at would be to get into what I called the assignment of errors and the certificate of its sufficiency everything that was really important to be looked at by the Supreme Court and would get away from the Supreme Court's fear that they would have to look over a great mass of stuff. The preparation of the assignment of errors and the preparation of the certificate of its deficiencies would constitute information of what was worth while to look at in the record, and if you concentrated sufficiently I could not see anything that would be served by having the typewritten record go up. It is the same

sort of thing that you have right along in your own affairs where you turn over to a competent junior the matter of picking out of the mass of papers what is worth looking at; only this picking out would be done when you had the fear that you might be making a mistake at times. You have got to pick it out then instead of by and by. If that was done at that time it would sometimes convince a man that he had not enough to go upon, that he would not become convinced of it he just droned through the preparation of a bill of exceptions and trusted in Providence that there would be something there when he got through and had time to think it over.

SECRETARY GRINNELL.—I agree entirely with that idea, so far as sending up the record is concerned. In some cases I gather from the occasional remarks of judges that counsel do not always either do their work or are not always, in every case, competent to pick out the essential points, so that the case is dumped on the court in a sort of undigested fashion. That is perhaps going to continue occasionally, even under this changed plan; and having the single typewritten copy there for reference, it seemed to me it might be useful, since it has been actually copied out. I agree it is a minor detail.

MR. MCCLENNEN.—It seemed to me that you really tended toward more sloppiness in practice if you had the idea that that record was going to be there.

SECRETARY GRINNELL.—Perhaps so.

MR. MCCLENNEN.—It is there if it is wanted; you can send down for it at any time. But the general idea is that these reduced papers are what the court is going to have to look at and it is your job to see that those get in everything that you want—that both sides want to have the court look at.

MR. D. T. O'CONNELL.—May I ask as a matter of information that some member of the Judicial Council, perhaps Mr. Grinnell, will explain why the court opposes this change? I was a member of the Committee on Legislation last year and we met the same question. The Council, as I recall, made substantially the same recommendation. The Committee on Legislation was very much bothered by the strength of opposition by the court itself. The new Committee on Legislation will probably be confronted with the same consideration. The Judiciary Committee of the Legislature will also be confronted with the same consideration. I would like to raise this question: Whether the relief along the lines suggested by

Mr. McClennen could not be obtained by rule of the court rather than by legislative acts?

THE PRESIDENT.—Mr. Grinnell, can you answer that question?

SECRETARY GRINNELL.—As to the attitude of the court on this subject, I don't know that we have any recent direct intimations. My own recollection is that our views were based on casual conversations extending over a period of years with judges and others who had talked with judges. I don't know now exactly which judges I have talked with in the past ten years or so on this subject, but I have distinct recollection of having discussed it with some of them. We said nothing in the report about the attitude of the court, but as Mr. Mansfield said this morning—and I responded sympathetically to his statement—he thought very likely the court was opposed to it. My impression would be that if that is so it would be the result of the force of habit, which is apt to be pretty strong not only with lawyers but also with the court. I think that the other habit which has been spoken of by some judges of other Appellate Courts where they like the question and answers, is a habit which could be developed. In other words, I do not believe that they would find it any more difficult than the present method. And an additional fact, I think, is that the change would be worth making because I believe that the court will be able to grasp the facts more surely and more clearly if they have the case as it took place downstairs than if they have to take it out of the narrative form, which is not what happened downstairs. The case taken up is the case which took place downstairs. The case which gets up is not always, in accordance with the pretty common opinions of the bar, the case that happened downstairs. I think one of the things to be done is to do everything possible to make that case as it was tried available for the court of appeal. I do not see myself why they cannot, after a little experience in the change of practice, accustom themselves to dealing with the records in this form just as they do in any other form.

I can add my own testimony to what Mr. Davis said as to the Rhode Island practice. I had a case before the Supreme Court of Rhode Island, about fifteen or twenty years ago. That case I had to argue twice. But the briefs were all typewritten on both occasions.

MR. MANSFIELD.—What about the rule? Someone asked you about the rule of the court.

SECRETARY GRINNELL.—The present statute, as I remember it, provides that the exceptions shall be reduced or the record shall be reduced to summary form. That word "summary" is in there. How far under that language and the long established practice of the court, the court would feel, even if it sympathizes with the idea, like making a rule in the form that has been suggested, it seems to me is a matter of doubt. My own belief is that it is proper that this thing should be considered on its merits, as a matter of public interest, in which the opinion of the bar and the relation of the whole question to the complaint of delay, and so on, are to be considered. I do not think myself that the views of the court exclusively should be regarded as a determining answer. The court sometimes changes its mind, as they did on the half-hour rule after ten days' notice. The practice of half a century was changed as a result of a perfectly accidental speech made by the Chief Justice of Pennsylvania before a luncheon of the Boston Bar Association, at which four judges of the Supreme Court were present. He described the half-hour rule on arguments before that court in Pennsylvania. Our Supreme Court here had the heaviest docket they had had that winter, and ten days after that account was given at that luncheon they tried the experiment of the half-hour rule, and it has been in effect ever since. I think that in the same way changes of this kind will be found to be workable, just as I think another part of the Pennsylvania practice might be found very useful, by which they require the substance of the case to be stated in say not more than twenty lines, or certainly not more than the first page of the brief, so that the substantial questions of law, while they can be elaborated in detail as much as they please, are all printed on the first page of the brief and there they must be printed or the appeal will not be heard. Without so drastic a rule as that, some such plan of bringing a case to the attention of the court in concise form might be tried here as an experiment and see how it works. I think we have got to keep on trying experiments in these various matters in order to get anywhere. I have heard it stated very directly that this practice in Pennsylvania of half-hour arguments, which has been in force for years, and this practice of condensing the statement of the case to the first page so far as the substance of it is concerned, has resulted in the reputation of the Pennsylvania Bar before the Supreme Court of the United States of arguing their cases more clearly and concisely than any other bar in the country.

MR. O'CONNELL.—May I ask Mr. Grinnell a question? Would it not be possible for the Judicial Council to find out with some degree of authority whether the court is opposed? Apparently the answer already given is based more or less on gossip; it is an indefinite understanding. Logically, this matter, if adopted here today, will go to the Committee on Legislation and the Committee on Legislation will probably get the same idea that they did last year, that the court is opposed. Instinctively, the committee does not want to oppose the court.

SECRETARY GRINNELL.—Why not?

MR. O'CONNELL.—They probably will feel that the court has some substantial reason. Now if the court has reasons I think the reasons ought to be analyzed and the committee should know it. It seems to me it should be determined by the committee or some member whether or not the court is opposed to it; otherwise we are more or less shooting in the air. We are told that the court is opposed. Nobody can say authoritatively whether the court is opposed.

SECRETARY GRINNELL.—Whether the Council would undertake to do that officially I am not sure. The Council has considered the matter on its merits as a measure which seems to them important in dealing with the whole problem of judicial administration. They felt that it should be considered independently of the views of the court and should be so discussed. They said nothing whatever about the views of the court in the report, except so far as the sentence might be so considered where they say they do not think the judges would find it any more work under this method than under the old method. I do not think I can answer any more definitely than that. Personally, I have no objection to talking with the judges of the court on the subject and seeing what they think about it. But it seems to me it is a matter in which the bar and the public are so directly concerned that it ought to be considered independently of the views of any judge except so far as their experience may contribute to the discussion; and I do not know that they have any experience—except under the recent criminal statute—of the question-and-answer practice.

MR. O'CONNELL.—Mr. President, I move the adoption of the recommendation as made by the Judicial Council.

THE PRESIDENT.—Brethren, you have heard the motion. Is there anything further to be said? If not—

MR. MANSFIELD.—Mr. President, I would like to say a word. I hope the members will not think that Brother Grinnell and I are

monopolizing this discussion, but since we are the only members of the Judicial Council present I suppose we are expected to say a good deal, and perhaps we would be forced to say something anyway whether we wanted to or not. But as to the suggestion that the views of the Supreme Court members might be taken on this point, this occurs to me: The first lesson that is learned in diplomacy, I am informed, is for the ambassador or minister that is accredited to a foreign country never to ask for a favor unless he finds out in advance that the favor would be granted, and if he finds out in advance that it would not be granted, then he is not supposed to ask for it, because if he does his style might be cramped, so to speak. I suppose that one reason why it would not be a good idea to ask the views of the Supreme Court about this is that we might get an adverse answer, and if we did it might make it a little difficult to proceed further with the recommendation. Possibly it would be better not to seek a view which we are pretty well assured in advance is going to be adverse.

MR. MCCLENNEN.—It might also be advisable to ask the judges of the Superior Court, too. They are, of course, really as much affected.

THE PRESIDENT.—Are there any further remarks? [The motion was put and carried unanimously.]

THE PRESIDENT.—What is the next business?

SECRETARY GRINNELL.—I don't know but it may be time to break up.

MR. MANSFIELD.—Mr. President, may I have the very doubtful honor of propounding to the president his first parliamentary problem?

THE PRESIDENT.—Mr. Grinnell is here.

MR. MANSFIELD.—I assure you that I propound this problem from a sincere desire to be enlightened and not for the purpose of having some fun with the chair. This is the problem that occurs to me: Mr. Nichols' report on various matters in our Judicial Council report recommended that this particular matter that we have just adopted now be accepted by our Association provided it obtained the approval of the judges of the Supreme Court. That report was accepted and the first question I would like to ask is, having accepted the report, does that mean that that is the view adopted by the Massachusetts Bar Association in passing that? Now we have adopted a motion recommending the Judicial Council's report, which is to adopt this regardless of what the Supreme Court

thinks about it. If when we accepted Mr. Nichols' report we went on record as in favor of his recommendation, then this motion we have just adopted is not compatible with it.

THE PRESIDENT.—My ruling would be that in accepting Mr. Nichols' report we simply took what he gave us and discharged the committee. I do not understand that without further action we approved or disapproved of anything that was said.

MR. MANSFIELD.—Then this last motion becomes the formal action of this convention?

THE PRESIDENT.—I think it would.

SECRETARY GRINNELL.—Mr. President, before we go further I would like to move a vote of thanks to the Selectmen of Plymouth for their courtesy in extending to us the use of Memorial Hall. And after that I would like to move a vote of thanks to Judge Davis of Plymouth also for his great assistance in making arrangements for the meeting in general.

[Both motions were unanimously carried, after which, at 3.15 P. M., the meeting adjourned.]

F. W. GRINNELL,
Secretary.

Note.

The unpublished account by Judge Trowbridge of his conversation with Chief Justice Oliver in 1774 referred to in the notice of the meeting and in the special number of the QUARTERLY distributed at the meeting and sent out herewith, was not read as time did not permit. It will be printed in the QUARTERLY soon with other historical papers.

F. W. G.

EXTRACTS FROM ADDRESS OF GOVERNOR FULLER TO THE LEGISLATURE AT OPENING OF SESSION ON JANUARY 4, 1928, RELATING TO JUDICIAL PROCEDURE AND CERTAIN OTHER MATTERS.

The matter of exceptions, appeals and motions for new trials in capital cases should receive your serious consideration, and, I believe, should be acted upon at this session. A plan that will place our courts in the position to take and hold control of capital cases, from their beginning to their ultimate conclusion, and which will make it certain that the governor will not be compelled to encounter the difficulties which were forced upon him in the year 1927 by the zealous defenders of persons convicted of first-degree murder, should be formulated and made effective by appropriate legislation.

One way in which these things can be accomplished is pointed out in the recent report of our judicial council, as follows:—

> In a capital case the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence, and the court may order a new trial if satisfied that the verdict was against the law or the weight of evidence, or because of newly-discovered evidence, or for any other reason that justice may require. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If a motion is so remitted, or if any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

The remedies there pointed out could provide no fairer nor more painstaking and considerate review than was granted in the recent murder cases before me. Neither our supreme judicial court nor any other tribunal acting as a court of appeal could be expected, in any case, to interview, personally, all witnesses and jurors and the host of other interested persons, as was done at that time. The point is, however, that the work of considering and passing upon these matters should be done by the courts, and the report of the judicial council shows one way in which that may be accomplished.

In this connection I repeat what I have said on previous occasions,—that for the prevention of crime generally we have to rely principally on justice, swift and sure, and that the criminally inclined must be made to understand that it is well-nigh certain that any criminal acts on their part are sure to be found out and quickly punished, and that no politics, nor money, nor influence, nor organized demonstration can help them to avoid the consequences of their crimes.

A prominent advocate of leniency toward murderers has said that "the theory of frightening miscreants by imprisoning or executing them is doomed to failure because it is apparent that men cannot be frightened into virtue."

At the same time, so far as possible, dangerous criminals must be restrained from their activities by every means in our power, and we cannot wait for the happy time when our psychiatrists can work such a miracle on the criminally minded as occurred in the case of Saul of Tarsus.

I am convinced that in that hour, day, week, or month, whatever it may be, when the commission of a crime is contemplated and planned, the only effective deterrent that impresses certain criminals is the upraised avenging arm of the law. The public official who does not do his duty in enforcing the law or who temporizes or equivocates, or the person who publicly preaches a policy of sentimentality in dealing with these criminals, is encouraging crime. He should feel that to a degree he is responsible for crimes of a similar nature that thereafter may be committed, as I would have felt, if some of our murderers had escaped at my hands their just deserts.

* * *

The members of the Massachusetts bar have a duty to perform in improving our judicial procedure. The Honorable Charles Evans Hughes in a recent address placed directly upon the bar responsibility for purging itself of practices and abuses some of which he indicated. He spoke of the law's delays—the terrible congestion of court calendars amounting to "a defeat of justice." He asked that "every lawyer feel that he is at bar not only for the purpose of making a living, for the esteem of his fellows or for a name, but as the member of a profession which has a peculiar duty to society"—to "help the cause of justice forward."

We have a right to look to the members of the bar to discover defects in the practice of their profession and in the conduct of litigation. We know that their combined strength and influence are sufficient if they will but make use of them to correct these defects.

We rely upon them to make the attempt, and assure them of our co-operation in so doing.

Biennial Sessions.

I believe that the people of Massachusetts desire biennial sessions of the Legislature. I think this matter should be referred to the people and that they should be given an opportunity to express their views on this subject through the ballot box. This matter has to do with their business. They have to pay the bills and they should be consulted. Personally I have no doubt as to what the verdict would be.

Legislators Acting as Counsel.

I renew my recommendation for the enactment of legislation prohibiting appearances of members of the Legislature as counsel for hire before any board, department or commission of the commonwealth during their term of office as legislators. * * *

Conclusion.

Any review of the state's activities for the past year that failed to recognize the distinguished service rendered the state this past summer by four private citizens would be incomplete. I refer to the service rendered by A. Lawrence Lowell, Samuel W. Stratton, Robert Grant and Joseph Wiggin.

I believe the labors of these men afford as fine an example of disinterested, unselfish public service as I have seen during my administration. I think it must have been some such trying ordeal as this that Daniel Webster had in mind in his last speech in the Senate in July, 1850, when he said:

> "I feel that when I, and all those that now hear me, shall have gone to our last home, and afterward, when mold may have gathered upon our memories, as it will have done upon our tombs, that state, so early to take her part in the great contest of the Revolution, will stand, as she has stood and now stands, like that column which, near her capitol, perpetuates the memory of the first great battle of the Revolution, firm, erect, and immovable. I believe, sir, that, if commotion shall shake the country, there will be one rock forever, as solid as the granite of her hills, for the Union to repose upon. I believe that, if disasters arise, bringing clouds which shall obscure the ensign now over her and over us, there will be one star that will but burn the brighter amid the darkness of that night; and I believe that, if in the remotest ages (I trust they will be infinitely remote) an occasion shall occur when the sternest duties of patriotism are demanded and to be performed, Massachusetts will imitate her own example; * * *"

THE LOSS OF JUDGE FLYNN.

By Charles M. Davenport.

(Reprinted from the "Boston Transcript" of January 17, 1928.)

The untimely death at forty-seven of George A. Flynn, a justice of the Superior Court of the Commonwealth, is a community and a state loss. His life, as a son of a widow left in poverty, as a husband and father in a home of five young children, as a citizen of Boston, and as a justice of the Superior Court, had superlative merit. It was one of those inspiring examples of what opportunity, open to all if made use of, can produce—a lesson of what force of character, energy, determination, hard work and sterling honesty will achieve. As a lad he had sold papers, done chores, anything to bring pennies to the home; at fourteen he became an office boy in a lawyer's office, studied and worked nights; by twenty he had passed the state bar examinations, and at twenty-one, the earliest time possible, was admitted to the bar. Within three years he became assistant corporation counsel for the city of Boston, later corporation counsel, then chairman of the Finance Commission, supervising the expenditures of the city, and at forty-one, a justice of the Superior Court, the great trial tribunal of the Commonwealth. Active as a citizen, but never as a politician, every promotion came from merit, never from recognition for political service. The pride of his modest mother and the devotion of the son, the two who had for years struggled together against adversity, though it is incidental, was, nevertheless, a touching picture. It was the background for his homely virtues, his reverence, his loyalty, his respect for effort, his fearless honesty, his lovableness.

Without inherited advantage and with only a common school education, yet his professional advancement was steady and sure. Each position of trust and of public responsibility found him self-reliant, but his self-reliance was tempered with humility, and with a readiness to efface and make himself a part of a means to an end, a public duty as he saw it.

Before he was made a justice of the Superior Court, he had done responsible things. He had measured his abilities with those of strong men at the bar. When he became a judge, he did not merely limit himself to doing the day's work, he tried to do it as a

part of the whole judicial organization. His indomitable energy and his vigorous personality led to his selection for important assignments. For his unsung service as presiding justice for a whole year over the criminal sessions in Middlesex County, the second largest in this state, in the height of a so-called "crime wave," when the community was startled daily by some new crime of violence, the citizens of Massachusetts owe him an unpaid debt of profound gratitude. His administration of the criminal terms during that year, firm, energetic and determined, drove the first strong spike into the Massachusetts "crime wave." He studied the causes, the prevention and the punishment of crime. It was obvious to everyone that crimes of daring violence must be stopped. "But how?" was the question. Some said new legislation, some said legislative investigation, others had other prescriptions. Judge Flynn realized that one of the inducing causes of crime was the hope, the chance, which the criminal held of ultimately escaping punishment. Without acclaim, Judge Flynn set to the task—criminal administration was made vigorous and speedy. When guilt was positive and the crime serious, he was severe. Punishments were made deterrent. His simple, vigorous handling of the situation had its effect elsewhere in handling like situations and by the end of the court year the backbone of that "crime wave" was broken. Doing this duty, as he saw it to be, firmly and fairly, was not without great personal strain, and not without some criticism from impatient attorneys and persons otherwise minded—apart from the criticism of criminals themselves, none of whom or their friends were, of course, satisfied. Pathetic appeals of the innocent families and others upon whom the brunt of the backwash of crime always falls, nearly unstrung him on many a day—how could it be otherwise for a man of his fine qualities, who himself had come up through adversity, and who was a devoted son, husband and a tender father to small children, knowing to the fullest what home and its ties meant. For the firm courage, the cost to himself, and the achievement in this episode of his judicial career, the citizens of Massachusetts owe him a debt of gratitude.

As a judge, he had full appreciation of the large factor strong judicial administration plays in a successful system of justice. He believed that justice meant a right to an early trial in civic matters, and a speedy and a fair trial in criminal ones. He lent his vigorous personality to his convictions in this respect and co-operated with his able chief justice and with the members of his court, in wiping

out judicial delays. The bar knows what has been done in this direction in the last three years—even if the public does not—and the part which Judge Flynn performed is well known.

The foregoing are only instances significant of how Judge Flynn's life, without inherited advantage, was made effective, and are only suggestions of why his untimely death is a loss to the community and to the state.

To his friends, to his associates and to those who knew him best, he was nothing else than lovable—firm and effective, he was sweet spirited and simple, conscientious to a fault, loyal to his convictions, but without fear or favor in the performance of what he conceived to be his duty. No community nor the state can afford to lose a strong personality in high place, but when combined with the fine qualities of character, as in Judge Flynn, with so much of accomplishment, and so many years of promise, the loss seems doubly great.

The Bench and the bar earnestly sympathize with his bereaved family.

THE LETTER OF RESIGNATION OF THE SUFFOLK COUNTY COMMITTEE ON CHARACTER.

BOSTON, MASS., December 16, 1927.

HOLLIS R. BAILEY, ESQ.,
Chairman of Board of Bar Examiners for
the Commonwealth of Massachusetts,
84 State Street,
Boston, Massachusetts.

Dear Mr. BAILEY:—

On June 10, 1927, we caused to be delivered to you our resignations as members of the Suffolk County Committee on Character. We therein briefly stated to you the underlying reasons for that action. They are set forth herein in more detail.

Pursuant to a conversation which you had with the Chairman of our Committee at that time, and a conference which was subsequently had with the Board of Bar Examiners and the undersigned, it was agreed that the matter of the tender of our resignations should be considered as suspended, pending a consideration of the matters discussed at the conference. Later, you notified the Chairman of our Committee that the Board of Bar Examiners had considered the matters referred to in our said letter and had decided to ask us to permit the matter of our resignations to stand still further suspended, at least until after we had conducted the inquiry which would follow the mid-summer examination of applicants for admission to the Bar. At that time, you stated that the Board of Bar Examiners, or some members thereof, would be present when we conducted such inquiry and thus have opportunity to see and judge for themselves the situation which we discussed at our conference. To this we agreed. In October of this year that inquiry was conducted. You and another member of the Board of Bar Examiners, George S. Taft, Esq., were present at part of those hearings. From what was said to us by you, and more particularly by Mr. Taft, we are warranted in saying that you agreed that the condition hereinafter referred to really exists and should be remedied.

Our position ought to be made clear to you. Chapter 221, Section 37 of the General Laws, as amended by Chapter 290 of the Acts of 1921, provides that a citizen may file a petition in court

to be examined for admission as an attorney at law "and, if found qualified, to be admitted as such; whereupon, unless the court otherwise orders, the petition shall be referred to the board of bar examiners to ascertain his acquirements and qualifications. If the board reports that the petitioner is of good moral character and of sufficient acquirements and qualifications, and recommends his admission, he shall be admitted unless the court otherwise determines, and thereafter may practice in all the courts of the commonwealth."

On or about December 22, 1922, the Board of Bar Examiners for the Commonwealth of Massachusetts established a rule, approved by the Supreme Judicial Court of the Commonwealth on January 17, 1923, which rule reads as follows:

> "RULE VII. MORAL CHARACTER.
>
> A preliminary inquiry whether an applicant is of good moral character may be made by committee of the bar requested by the Board of Bar Examiners to furnish such assistance.
>
> It is the duty of each applicant to supply such committee with any assistance and information which it may require and to appear before it when requested."

The procedure now obtaining in connection with admission to the Bar is substantially as follows. The applicant files a petition with the Court having jurisdiction, praying for examination for admission as an attorney, in connection with which petition he is required to file certain other papers showing his name, age, general education, recommendations for admission, et cetera. The petition and accompanying papers are then referred to the Board of Bar Examiners for the Commonwealth. Later the Board of Bar Examiners fixes a day and place for the examination of such applicants for admission, which examination consists of written answers made by each applicant to printed questions formulated by the Board, and is limited to three hours in the morning and three hours in the afternoon. These written answers are then examined by the Board which decides whether or not the applicant has passed the examination. The Board causes to be published in the newspapers the names of those who have so passed and then sends them a printed questionnaire in which certain questions are propounded to the applicant and are to be answered by him, designed to give information to the Board as to the character of the applicant. Since the establishment of Rule VII, above quoted,

these questionnaires when received are sent to the committee of the Bar of the county in which the applicant resides and which committee had been theretofore appointed by the Board of Bar Examiners to furnish assistance to it in the preliminary inquiry referred to in the rule. With the questionnaire the applicant is supposed to file two letters, preferably from attorneys, certifying to personal knowledge of the good moral character of the applicant, which letters are sent by the Board to the committee assisting in the inquiry. These committees have come to be known as "Committees on Character". In this manner there are usually referred to the Suffolk County Committee the names of substantially one-half of the entire number of those in the state who have passed the examination. It has been the practice of the Suffolk County Committee on Character to give at least seven days' notice to those whose names are referred to it of the time and place when and where the Committee will sit to conduct hearings in the matter of the inquiry which they were instructed to make. These hearings are almost always held in one of the rooms of the Supreme Judicial Court in the Court House at Pemberton Square, and the whole committee of five members is present at each hearing. The applicants do not go into the hearing room together but appear only one at a time, and the Committee examines as fully as it feels advisable and within the limits of its authority. These examinations have clearly shown that a great many of those who pass the written examination of the Board of Bar Examiners are totally unqualified to practice the profession of the law. They have neither sufficient legal nor general education; they have no proper appreciation or conception of their obligation as attorneys to the Courts, to their clients, and to the public. Some of them have used the expression to us, when we have asked their reason for discontinuing their present occupations and entering into the practice of the law, that the latter is a better "job". The responsibility which they are about to assume as attorneys and as officers of the Court has made no impression whatsoever upon these men. They have no realization of the meaning of the oath which they take as attorneys at law when they are sworn in by the Court. Yet these men are not men of bad moral character, as that term is used. Our Committee is appointed to assist the Board of Bar Examiners in making "a preliminary inquiry whether an applicant is of good moral character". We cannot say that these men are not of good moral character, even though we are positive that

they are not duly qualified for the practice of the law. The names of these men have been already published as having satisfactorily passed the examination for admission to the Bar and therefore as having satisfied the Board of Bar Examiners that they are "of sufficient acquirements and qualifications". If these applicants are subsequently refused admission, it is presumably upon the ground of their not possessing the other necessary statutory prerequisite, namely, that they are not "of good moral character". Some members of our Committee have been spoken to by members of the community as to their experiences with some of the more recently admitted attorneys. We feel satisfied that the community believes that these so-called "Committees on Character" make an investigation into all of the qualifications of an applicant and that, when these applicants are admitted to the Bar, the community believes that the Committees on Character after conducting such inquiry have determined that these applicants are thoroughly qualified to receive the confidences of the public and to guide those who may consult with them to secure proper and expert advice and assistance. In truth and in fact, no such inquiry has been made by the Committees on Character. They are not authorized to conduct any such inquiry. That duty and obligation is with the Board of Bar Examiners and it rightly belongs there. We, therefore, are unwilling to function longer under these conditions, believing as we do that the public attaches to the result of our work a representation which in truth we do not and have no power to make.

Conditions have entirely changed since the time when the present method of examination was instituted. The method of examination should be revised to meet those changed conditions. We are firmly of the opinion that in addition to a written examination, if one is had, there should be an oral examination, which oral examination should take place in the presence of the entire Board, or certainly of a majority of its members. That Board could then more satisfactorily judge the acquirements, qualifications and moral character of every applicant. As it is now, the Board has no personal contact with the applicant, but contents itself with a written examination taking not over six hours, and in which the field of inquiry as to knowledge of the law must of necessity be extremely limited. We fully realize that the suggestion made if adopted means a tremendous amount of time and effort and labor upon the part of thoroughly skilled lawyers composing the Board of Bar Examiners. We know that it is most unjust to ask

them to give this time, effort and labor for the compensation which they are now receiving. That cannot for one moment be considered as reasonable. Proper and even liberal compensation ought to be given to the members of that Board. They have a very important task to perform. It may be that upon consideration it will be thought more advisable to have a Board of Bar Examiners who would cause the State to be divided into districts and who would exercise general supervision over all examinations and over all hearings, causing the written examinations to be held at one and the same time in every district, those written examinations to be the same in each district; that such examinations should be held under the immediate direction of local examiners appointed for each district; that such local examiners should conduct oral examinations under certain rules formulated by the Board of Bar Examiners; that from the decision of such local examiners appeal may be had to the Board of Bar Examiners and from that Board, as is the case now, to the Court. Something along this line ought to be worked out. It is our opinion that it is vitally necessary that oral examinations be conducted in the presence of and by a competent body. The protection of the public demands this. The State is not justified in granting a license to a person to engage in the practice of the law and thereby hold that person out to the public as one fitted by education and training to guide them in their actions unless and until that person has the qualifications which the State so holds him out as possessing.

We therefore insist that the agreement as to the suspension of our resignations be ended and that our resignations be accepted.

Respectfully yours,

ABRAHAM K. COHEN,
CHARLES S. HILL,
ELIZABETH M. TAYLOR,
JAMES N. CLARK,
ROBERT GRANT,

Committee on Character for Suffolk County.

THE READING OF HISTORY AS AN ESSENTIAL REQUIREMENT FOR ADMISSION TO THE BAR.

In conversations with the late Judge Sheldon during the life of the Judicature Commission in 1919 and 1920, he expressed the view that under the present statutes a reasonable amount of required reading in the constitutional, legal, and general history of the state and nation might properly be required as a natural and necessary part of the *legal* qualifications for membership in the bar. In other words, that men should be expected to have some working knowledge and understanding of the history of the state and nation, the laws of which they wish to take part in administering. This sort of study as a training in the critical faculty can only be obtained by reading, and generally reading alone. It simply requires access to books and the will to read them and think about them. Surely it is reasonable that men who wish to be lawyers should show some familiarity with the history of the law and of their government and with the use of books relating to these subjects.

These ideas were developed at some length in the QUARTERLY for July, 1922, pages III–XV, and a following tentative draft was suggested as part of an amendment to rule IV as to "Subjects for Law Examinations."

> "The law examination shall include also the general subject of constitutional and legal history, draftsmanship of legal papers and brief-making. The general ability to express ideas clearly in the English language shall also be tested by the examiners on the answers to the examinations in the various subjects or otherwise."

The need of some such requirement is emphasized by an article in "Harper's Magazine" for January, 1928, by James Truslow Adams which is here reprinted.

F. W. G.

OUR RACIAL AMNESIA.

By James Truslow Adams.

(Reprinted by permission from "Harper's Magazine," January, 1928.)

I have lately had occasion to read through the works of Thomas Jefferson and Alexander Hamilton. The great contest in which they were the leading figures on the opposing sides was the contest over the formation of a new nation with a new form of government. They dwelt, literally, in a "New World." The very existence of the ground on which they trod had been unknown to Europe a scant three centuries before. Much of the continent was still unknown and unexplored. Its inhabitants had decided to break loose from the Old World, to plunge into an unknown future, abandoning the well-worn monarchical and feudal paths, and to establish a new regime for mankind. According to present thought they might well have scrapped all knowledge of the past and said, "What has that to do with us or our present situation?"

That both Hamilton and Jefferson realized the newness of the experiment they were entering upon is obvious. Yet one is struck by their sane orienting of themselves with respect to the entire historical process. Each studies the conditions of the present, each attempts to forecast the influences and tendencies which will modify conditions in the future, but each, also, looks to the past for instruction and example. Each, in his efforts to influence the public, appeals to history to illustrate how human nature has shown itself, how it has reacted to given sets of circumstances and, hence, what might reasonably be expected of it in the future. Greece, Rome, the medieval period, and recent epochs were all ransacked to afford examples.

Both the education and the general reading of men in those days—and almost until the present day—favored this balanced outlook on life. The children of well-to-do and cultivated families, north and south, were thoroughly grounded in the classics. The history of Greece and Rome, their characters, their ideas, were as familiar to them as those of their own time. If the poorer people knew nothing of Greek and Latin, they were as thoroughly grounded in the history of the Hebrews. The Bible is a marvellous storehouse of history and character, of political as well as ethical

precept and example; and this most of the people knew almost by heart. Such books as they read, when not theological, were largely historical. In the recently published biography of "Uncle Joe" Cannon, the "hayseed member from Illinois," as he was first called in Congress, he tells us what his reading was as a hard-working small son of a pioneer on the Wabash. First, he read the Bible through from cover to cover every year from the age of nine to fifteen. In addition to this there was Josephus, Shakespeare—read and reread—Rollin's *Ancient Rome,* Plutarch's *Lives,* and anything else he could get hold of.

Today we have largely done away with all this. The small child is brought up on perfectly delightful books, delightful in text and illustration; but, however much they may stimulate his imagination and æsthetic sensibility, they can hardly be said to add to his knowledge of the past. When he advances into the grade and high schools he learns little history, whatever the curriculum may call for. The other day I asked a graduate of a high school if he had ever heard of the *Federalist.* There was considerable hesitation and then he said he thought it was a party. I said I did not mean a party but a book. No, he never had heard of it. When I pointed out that it had been one of the main influences in securing the adoption of our Constitution and that it was one of the few books produced in America which had a world-wide reputation, this information was apparently new to him. Henry Ford, with all his intelligence along certain lines and with a public-school education, testified that he had never heard of any Revolution in 1776, that the only one he recalled was "that of 1812," that he had never heard of Major André, and that he thought Benedict Arnold was a writer. These are by no means unique cases. Question almost any high-school student taken at random on the facts of history, even the outstanding ones in his own country, and you are likely to find the results appalling.

When a boy or girl advances to college the conditions are not much better. I am not speaking anywhere in this article of the exceptional student or the exceptional man or woman, but of the great average mass which is called "the people." The old idea of a college or university as a place where a student is supposed to receive mental training, to learn how to use his faculties, and to obtain a grounding in the best which has been thought and done by mankind in the past, has apparently gone for good. We have reached the point where courses in real-estate selling, basket-ball

coaching, and so on, can count points for degrees. Just what the modern state college, or even the older and pretendedly conservative universities, do for their students, other than to provide them with a course in social mixing, opportunities for making friends useful to them in business later, and perhaps some occupational training, I do not know. Remember again, I am not speaking of the exceptional student or of the exceptional professor. Some time ago I asked a professor in one of the oldest and largest Eastern universities what his institution did for the thousands of young people who passed their four years there. His answer, after some deliberation, was, "We turn out, as far as I can see, a low-grade standardized product, like Ford cars, with just about as much thinking capacity."

This may have been unduly pessimistic, but that it was true in the main can be proved by listening to the conversation of college graduates successful enough to belong to a college club. There is nothing to distinguish their talk from what one may hear at the Bankers' Club, Realtors' Association, or any other business men's organization. There are five standard topics: business, the stock market, bridge, golf, and politics, the last almost invariably as it affects business. Prohibition used to be a sixth, but everyone has his arrangements made now, and the interest in that topic has declined. I recently lived for five months in one of these clubs. Americans are not noted for low voices, and it was impossible that I should not unintentionally overhear innumerable conversations. Never once did I hear the slightest mention of literature, art, economic or national affairs considered at all seriously, or anything except business, sport, and politics. And when these were on the carpet there was evident an utter lack of background. The social and economic theory of the speakers seemed to be limited to the belief that anything which tended to interfere with the rapid expansion of business or the stock market was "red," "damned anarchy," "ought to be hung," etc. In politics it was always personalities, never principles. It is for this reason that Roosevelt always had to shake hands with the engineer, that Harding used to be photographed in a Shriner's fez, and that cautious Coolidge has to wear chaps with CAL on their sides and mount the horses which he dreads.

II.

If the education of today fails to place a man in his human world, past as well as present, so also does most of the popular reading of

today. And I say this despite the enormous sales of such books as Wells' *Outline* or Van Loon's *Story of Mankind.* Even these (although I know a great many people who bought Wells' book, I do not know anyone who has yet read it through), after all, are exceptional. The popular reading of today is fiction and science. Historical novels are not the best sources for historical knowledge; still one who was brought up as a child a generation ago on *The Dove in the Eagle's Nest,* the *Waverley Novels, Romola, Hypatia, The Last Days of Pompeii,* to mention only a few at random, had at least some idea that the world did not begin with his own birthday. Today the novelist concentrates on the immediate present. He must write on a problem of ten minutes ago. As far as most fiction is concerned, the world might have been made in 1918, with an occasional glimpse into the prehistoric era of the World War. As for science, what interests most people is the practical application of it, the invention of the moment in what is otherwise a timeless phenomenon. Science, while it may expand a man's view of his physical surroundings, does not help him find himself in the history of human endeavor and thought. It leaves him still at the eternal present.

The tremendous concentration these days on sport tends also to concentrate man's thought, or what passes for such, on the moment. When the average American is not working, you are pretty apt to find him either on the golf links or in a car. As a means of physical recreation and recuperation, golf is excellent. As an endless topic of conversation, it is abysmally boring and mentally degenerating. As for motoring, the absorbing American passion, there is nothing better calculated to narrow the entire past, present, and future of existence to the mere physical exhilaration of the moment than to drive sixty miles an hour. Nothing devised by man—unless perhaps flying—so concentrates the whole of life to the emotion of the instant second.

Even the interest in great sportsmen or sportswomen has become limited to the moment. Who recalls the great names of even ten years ago? The hero of yesterday is utterly forgotten today. We can still recall Gertrude Ederle (was it last year or two years ago she swam the Channel?), but of the hundred million Americans who thrilled at the news that that gallant young gentleman, Lindbergh, had flown the Atlantic, how many remembered Alcock and Brown who had flown it in 1918, or even the fact that others *had* flown it before him? To a certain extent the press encourages this

quick forgetfulness. Much thus becomes sensational news that would not be otherwise had people better standards of news value.

In every way we are coming to live more and more not merely in a one-dimensional world but in a sharply focussed world, a world which is focussed on the present instant. The results are already becoming obvious. Henry Ford, a genius in one line and a supreme ignoramus in others, says history is "bunk," and innumerable people believe him, partly because they think, with the slipshod mental methods acquired in American schools, that, because he is an able manufacturer, therefore he must be able in all ways, and partly because it soothes any qualms they may have as to their own ignorance.

But is history "bunk"? That is, can we rely on men to settle the problems of the present wisely with no knowledge of what has been said, thought, and done in the past? What business man would be willing to have his memory of his own personal past completely obliterated? Is not that hard-won and carefully garnered experience of twenty, thirty, or forty years one of his greatest assets? Cancel all recollections in Ford's memory, let him come to his desk in the morning with a mind blank as to all he has learned of the character of men, of the processes of his particular business, and what use would he be? How many absurd mistakes would he make?

It may be said that the present conditions are so different from anything in the past that the past does not count. This is not so and can never be so. The fundamental problem of man, whatever the fortuitous accidents and conditions of his temporary type of civilization, is man himself. Human nature may change. Let's hope it does. But, if it does, it does so slowly, and the whole historic era is only a moment in the history of the race. The Neanderthal man lived, say, two hundred and fifty thousand years ago, the Greeks only twenty-five hundred. They are our blood brothers, and if one reads their works it is astounding to discover how many of what we think our most up-to-the-minute problems they considered and analyzed.

III.

It is not, however, for any specific solution to our problems that a knowledge of the past is essential and an ignorance of it dangerous. It is the need we have for some perspective if we are not to be led astray by every new achievement or every new social or political

nostrum. We do not really see things unless we see them in their relations—not merely in their relations to *us* but in their relations to similar events or conditions in the past. Unless we know something of what has been thought and done in the past, we are helpless in judging the present.

We are moving so fast today that we are utterly at sea as to where we are going. It is needless to point out the changes in the last century, compared with which the entire history of the race in material advancement may be considered almost static. I may merely say that I have myself talked with a relative who recalled the days when there was no such thing as steam locomotion in common use, and the horse or the sailboat was the only means of communication by land or sea. In this mad onward whirl some perspective, some sense of past achievement, some realization of values is more essential today than ever.

In studying the history of America for the past hundred and fifty years with relation to the so-called "common people" one fact stands out in striking significance—the loss in the power of thought. The average farmer today, for example (I choose him because most of the "common people" were farmers a century and a half ago) cannot, I believe, compete for a moment with his predecessor in the power of concentrated thought. He has more schooling, he reads more printed words, he has far more advantages in the way of securing news and moving about the world, he has incomparably more luxuries, and he has quicker wits, but he has less of them. Propaganda is no new invention. Our past-masters of the present day had nothing on Sam Adams; but let anyone read the sort of arguments addressed to the farming population in 1787 when it was necessary to secure their adherence to the new federal constitution and the sort of arguments they are given in a political campaign today. The writings of that day, and the sermons, required a concentrated, sustained effort of thought, and the farmers gave it. Today the headline press, the tabloid press, the movies, and the radios give them everything in snatches or pictures. And it is not the farmers alone. It is the whole population, save those who can stand aside and think for themselves; and these are becoming rare. The slogans on the desks of "high-powered executives" are "Don't park here," "Be brief," "Make it short and snappy."

Moreover, the world today is singularly likely to be stampeded by the mob spirit. Partly due to the great increase in population, partly to its greater concentration, partly to the increasing lack of

privacy and quiet, partly to the newspapers, movies, and other means of acting upon vast numbers of people simultaneously, we are all likely to be imbued with the same emotion at the same time. Everyone recalls how the newspapers played upon this spirit when that modest and admirable young American, Lindbergh, was exploited to rouse the mob emotion of the United States in order to increase sales.

We all know how this mob spirit operates in its simpler manifestations, such as a panic at a fire. There is no thought of past or future. Every mental process is concentrated into the one thought of the present. If there is no one who can transcend that present in his own thought the mob goes wild. Given several, or even one such person, and the mob may be kept sane. The same thing is true of all other manifestations of it. But to stand apart from the mob requires that a man have "a mind," as we say, and to have a mind he must have memory. We all know cases of amnesia victims who wander aimlessly, unable to tell who they are, where they belong, what they have done. Without memory a man has no mind; that is, he is helpless without a knowledge of his past. He is living solely in the present.

There is danger that the race may suffer the same fate if we ignore all our past and live only in the moment. By doing that we not only discard all the accumulated examples and wisdom of the past but we are left with no standards by which to judge even the present. We become unable to criticize, analyze, compare—in a word, unable to think—and become merely creatures of emotions, subject to be played upon by any false statement, any blatant campaign, any newspaper catering to mob passion. To disregard the past, to delete the "humanities" from education, to read nothing except what is wet from the press, to pay no attention to what man has done and said in the ages gone, to foreshorten our world to the living instant, is to abdicate our intellectual birthright, to destroy our power of weighing and judging, to become the victims of racial amnesia.

DISCUSSION OF VARIOUS PROPOSALS IN REGARD TO SEALS ON DEEDS OR OTHER INSTRUMENTS IN MASSACHUSETTS.

The following bill was reported favorably by the Legislative Committee on Legal Affairs in 1927 and referred to the next annual session by the house.

HOUSE - - - - - - - - - - No. 580

AN ACT RELATIVE TO THE USE OF SEALS ON INSTRUMENTS RELATING TO REAL ESTATE.

"Chapter one hundred and eighty-three of the General Laws is hereby amended by inserting after section one the following new section:—

Section 1A. The validity of any instrument conveying real estate or any interest therein or affecting the title thereto shall not be impaired by the absence of a seal. An instrument having all the characteristics of a deed of real estate or any interest therein except a seal shall be included by the word 'deed', whenever it occurs in this chapter."

An alternative draft recently suggested was as follows:

The word "deed" shall include an instrument without a seal conveying or releasing real estate or any interest therein or affecting the title thereto, or a power of attorney therefor, and such an instrument shall have the same force and effect as if sealed.

The word (seal) in the several forms from 1 to 11 inclusive set forth in the Appendix to said Chapter 183 is hereby stricken out.

As the subject is brought up from time to time, the following report of the Committee on Legislation of the Massachusetts Bar Association in 1913 is here reprinted, together with all the various drafts which were prepared and rejected from 1912–1914 at the time when the act to shorten the form of deeds was under consideration. These various drafts will be found following the report of the committee. After that, we also reprint the carefully prepared comments on most of these drafts which were submitted by the late John L. Thorndike, about that time, in a letter to Judge Dunbar, the Chairman of the Committee on Law of the Bar Association of the City of Boston. This will bring together in one place for con-

venient reference the results of a great deal of work which was put into the matter at that time.

The act to shorten the form of deeds, c. 502 of 1912, was prepared by a committee of the Massachusetts Conveyancers' Association, of which Hon. W. T. A. FitzGerald was chairman, and it is largely due to the initiative and energy of Mr. FitzGerald that the legislature was persuaded to adopt the act, which has saved the county a great deal of money and a great deal of shelf room in the Registry of Deeds and has saved time and made things more convenient for title examiners. In the preparation of the act, much assistance was received from other conveyancers and committees of the bar and particularly from Mr. Thorndike who made many valuable suggestions which were adopted. The committee of the Conveyancers' Association struggled with most of the drafts which are hereinafter printed. The writer, who served on Mr. FitzGerald's committee, began by sympathizing with the desire to make seals unnecessary, particularly for the conveyance of real estate, but, as a result of careful study at that time in the light of the comments then made by Mr. Thorndike, Mr. William G. Thompson, and others who took an active part in the discussion, reached the conclusion that the law about seals in Massachusetts had better be left alone in order to avoid uncertainties in various branches of the law which would be more inconvenient than the well-understood requirements and consequences of a seal.

F. W. G.

EXTRACT FROM THE REPORT OF THE COMMITTEE ON LEGISLATION OF THE MASSACHUSETTS BAR ASSOCIATION IN 1913 (pp. 26–31).

As to the Proposal that Seals Shall not be Required on Conveyances of Real Estate.

Many members of the bar sympathize with the desire to get rid of seals because they sometimes seem to be a nuisance and an unnecessary formality. Their abolition was advocated in this state as far back as 1859 by a writer in the Law Reporter, vol. XXII, pp. 193–199.

It is true today, as it was then, that many states have statutes making them unnecessary, or substituting scrolls, and one of the main reasons given in the article above referred to, for doing away with a seal, was that "its abolition would be a step towards that uniformity so essential to convenience," etc. (see page 196).

But an examination of the statutes and decisions in different

states in the Union shows that there is very little uniformity either as to the statutes or as to their effect, and less uniformity and more uncertainty in the law as a result of these statutes.

To illustrate the differences other than mere loose drafting of statutes: *

1st. Some states attempt to abolish all seals, whether used by individuals or corporations.

2d. Some abolish only individual seals.

3d. Some abolish them or do not require them for conveyances only.

4th. Some substitute scrolls.

5th. Some have supplementary acts which attempt to meet objections by providing that all written instruments shall imply a consideration which can be rebutted.

6th. Some provide that instruments showing an *intent* to be sealed instruments shall be treated as sealed although not sealed.

Under many of these statutes questions arise as to impeaching consideration in actions on covenants, conflict of laws, etc.

The question comes down, therefore, to this: Is the fact that they are considered a nuisance a sufficient reason for a change which might further complicate the law of contracts?

> "*In the common law, it* [the seal] *has been made the general test of the character of legal obligations, the source of their general division into simple contracts and specialties*" Law Reporter, *supra*).

The contractual aspect of a conveyance of land is more important in the country districts of the state than in the larger cities where titles are subjected to keener scrutiny, and covenants of warranty are avoided as much as possible. In the country districts a full warranty deed is expected and is relied on. The decisions in other states where they have legislated about seals indicate that the practical value of such a warranty would be rendered so uncertain by making a seal an optional formality that every careful conveyancer in Massachusetts would continue to use them, and that those who did not might regret it. Under these circumstances your com-

* 1. General abolition of seals: Cal., Idaho, *cf.* La., So. Dak. (but see statutory conflict), *cf.* Tex., Utah, and 122 Ala. 502.

2. Abolition of individual seals only: Alaska, Ariz., Ark., Ind., Kan., Ky., Miss., Mo., Tex., Wash.

3. Abolition of seals on conveyances only: Ala., Colo., Ga., N. Y., R. I.

4. Scrolls substituted: Ala., Colo., Del. (by decision), Fla., Ga., Idaho, Ill.

5. Written instrument implies consideration: Ala., Ariz., Cal., Fla., Idaho, La., Kan., Mo., Tex.

6. *Intention* to seal given effect of seal: Ala., *cf.* R. I., S. C.

mittee do not see in the plan any advantage to buyers or sellers of land, or to the bar or to the public generally, of sufficient importance to outweigh the disadvantage to all of introducing a new complication and uncertainty into the law of contracts, the full effect of which cannot be clearly predicted.

One important function of a seal has been generally overlooked in the discussion, and that is, its function as a *preventive.* Prevention of litigation *and doubts* is the underlying purpose of our land court and its system of registering title which has developed so successfully in this state.

Now many questions for litigation *or doubts, which may cause more trouble than seals,* are prevented in Massachusetts by the necessity of a *seal,* which operates to avoid trouble and uncertainty, and to *preserve that uniformity* in the law of contracts *within the state,* which appears to have been sacrificed in some other states for the vague and disappointed hope of producing uniformity *among the states.*

The sharp conflict of opinion which has followed legislation about seals elsewhere is shown by the following remarks of Texas judges:

Texas first legislated about seals in 1858. In 1867, in the course of an opinion on the effect of the act, Willie, J., stated that it was meant to abolish forever these "relics of ancient barbarism" (see *Foster* v. *Champlin,* 29 Tex. 22, 29).

But in 1869 the court had changed, and in *Eborn* v. *Cannon's Admrs.,* 32 Tex. 231, Lindsay, J., said:

> "Every enlightened jurist cannot but concur in deprecating the confusion, superinduced in the construction and interpretation of written contracts in consequence of dispensing with seals and of everything of a like import in certain instruments. *The result has been to perplex and confound the clear conception and satisfactory elucidation of the legal effect of many sealed and unsealed instruments.* Such innovations upon long-established rules *which have become thoroughly interwoven into the very framework of the judicial system of a country* are rarely duly weighed and considered in the hasty legislation . . . *and the resulting mischief in complicating questions and in multiplying the uncertainties of judicial administration often largely overbalance the imagined benefits from a change."*

It is easy to call a seal a "relic of barbarism," and it is right that its value in modern law should be tested as everything else is

being tested. But applying this test we believe that the *preventive* value of the seal far outweighs any inconvenience which it causes.

The secretary of this committee has a mass of material from different states; but it has not seemed worth while to arrange and classify it all in detail.

It seems sufficient to give in a footnote* a rough classification of *some* of the branches of the law in which questions for litigation or doubt have arisen and may arise as a result of legislation about seals, and in some cases with peculiar results.

Of course some of these questions could be anticipated and provided for in a statute, and at least eight different draft acts have been suggested, copies of which are in the hands of the secretary of this committee.

But in trying to change a rule which, in the words of Judge Lindsay has "become thoroughly interwoven into the very framework of the judicial system of a country," one finds that in stopping

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* Some branches of the law in which questions arise are:

(1) Agency.
  a. Undisclosed principal.
    (a) Sealed instruments in general.
    (b) Deeds.
  b. Oral authority to execute.

(2) Consideration.
  a. Instruments in general.
    (a) Where parties intend consideration.
    (b) Where parties intend no consideration.
  b. Deeds.
    (a) To effect conveyance of title.
    (b) To make covenants binding.

(3) Covenants to run with land.

(4) Estoppel by deed.

(5) Statutes of limitations.

(6) Retroactive effect.

(7) Suretyship.

(8) Delivery.

(9) Escrow.

(10) Conflict of laws.
  (1) When instrument executed in state abolishing seals and sued on in state with similar laws.
  (2) When instrument executed as in (1) and sued on in state not abolishing seals.
    a. Distinction between remedy and obligation.
    b. What safeguard given against erroneous application of law? Covenants running with land.
  (3) When instrument executed in state not abolishing seals and sued on in one which does abolish them.
    a. Instrument unsealed.
    b. Instrument sealed.
    What protection against erroneous application of law?
  (4) Situation may be (1), (2), or (3), and instrument may deal with land in state which has different law from place (a) of execution, (b) of suit.

Among the Massachusetts cases which indicate lines of uncertainty which might result from legislation about seals see *Williams* v. *Williams*, 8 Pick. 327; *Coddington* v. *Goddard*, 16 Gray, 446; *Shaw* v. *Farnsworth*, 108 Mass. 357; *Lerned* v. *Johns*, 9 Allen, 419, 421; *Elwell* v. *Shaw*, 16 Mass. 42, 47; *White* v. *Dahlquist Mfg. Co.*, 179 Mass. 431; *Mather* v. *Corliss*, 103 Mass. 571; *Williams* v. *Smith*, 161 Mass. 252; *Wheelwright* v. *Wheelwright*, 2 Mass. 454; *Fairbanks* v. *Metcalf*, 8 Mass. 238; *Elastic Tip Co.* v. *Graham*, 185 Mass. 600-601; see also 2 Bl. Com. 306, 307; Leake, Contracts (5th ed.), 7, 13; *Foundling Hospital* v. *Crane*, [1911] 2 K.B. 367.

one hole another is opened up, and after several attempts to avoid "the resulting mischief in complicating questions and in multiplying the uncertainties," of which we certainly have enough already in the law, one asks what is the use of unsettling the law merely to avoid the simple act of putting on a seal which really causes no serious trouble for any one?

Laymen often complain of the technical formality of law, *but the thing which causes by far the most serious complaint is doubt and uncertainty as to the application of the law.*

The law about seals is pretty well settled in this state and, this being so, we submit that there is a great deal of wisdom in the old saying "STICK TO THE DEVIL YOU KNOW."

*We advise against any attempt to legislate on the subject.**

VARIOUS DRAFTS CONSIDERED FROM 1912–1914.

Draft No. 1 (Proposed as § 4 of H. 950 of 1912).

SECTION 4. The use of private seals upon all deeds, mortgages, leases, and other instruments and contracts in writing affecting real estate is hereby abolished, and the addition of a private seal to any such instrument or contract in writing hereafter made shall not affect its validity or legality in any respect. This section shall not apply to the use of corporate seals.

Draft No. 2.

Any instrument conveying real property or any interest therein; assigning, discharging or extending a mortgage; surrendering possession taken under a mortgage; any party wall agreement; agreement for sale and purchase of real property; any lease; assignment or extension or guaranty of the same, and any power of attorney without a seal shall have the same force and effect as if a seal were affixed thereto except that this foregoing provision shall not alter the effect of the statutes of limitations relating to sealed and unsealed instruments respectively. The provisions of this section shall not apply to the use of a seal by a corporation.

Draft No. 3.

No instrument executed or delivered after this act takes effect relating to real property shall be held to be invalid for lack of a

* In considering this subject the committee has been greatly assisted by an examination of the laws of other states made by John M. Maguire, Esq., of the Boston bar. [Now Prof. Maguire of the Harvard Law School.]

seal. This section shall not apply to instruments executed by corporations and shall not be construed to affect in any way the statutes of limitations nor to affect in any way other than as above stated any other statute or other rule of law which distinguishes sealed from unsealed instruments.

Draft No. 4.

AN ACT TO PROVIDE THAT A SEAL SHALL NOT BE NECESSARY UPON A CONVEYANCE OF REAL ESTATE.

SECTION I. Section I of Chapter 127 of the Revised Laws is hereby amended by adding at the end thereof the words "and any instrument otherwise valid for this purpose shall also be valid without a seal," so that the same shall read:

Draft No. 5.

H 650 of 1914

AN ACT FOR THE SIMPLIFICATION OF SEALED INSTRUMENTS.

SECTION I. A deed which is executed and delivered by the person or by the attorney of the person, who has authority therefor shall, subject to the limitations of Section 4, be sufficient, without any other act or ceremony to convey land, and any instrument otherwise valid for this purpose shall also be valid without a seal.

SECTION II. This act shall take effect upon its passage and shall apply only to instruments executed or delivered thereafter.

SECTION 2. A written instrument not under seal purporting to convey lands, tenements or hereditaments shall be sufficient, according to its purport, as a deed of conveyance, but except as in this act specified nothing herein shall be construed as abolishing the distinction between sealed instruments and instruments not under seal.

SECTION 1. In any deed or other written instrument a recital that such deed or other written instrument is sealed by the grantor, or is given under the hand and seal of the grantor or the persons executing the same, or that such deed or other instrument is intended to take effect as a sealed instrument, shall be sufficient to give such deed or other instrument the legal effect of a sealed instrument without the addition of any actual physical seal, of wax, paper, or other substance, or any semblance of a seal by scroll or otherwise.

LETTER OF JOHN L. THORNDIKE, ESQ., TO HON. J. R. DUNBAR, CHAIRMAN OF THE AMENDMENT OF THE LAW COMMITTEE OF THE BOSTON BAR ASSOCIATION.

DEAR SIR:

Last summer Mr. Gray, then chairman of your committee, sent me a letter from Mr. F. W. Grinnell which urges the preparation of a bill on behalf of the Bar Association for the abolition of seals on legal documents generally or on some classes of them. I think that any such legislation would be a mischievous change in the law and ought to be opposed on the same ground that beneficial reforms are favored, and I will try to point out some of the objections to it.

The only ground upon which the change is urged appears to be an assumption that a seal is a useless technicality and might therefore be dispensed with, or that "it merely means sticking a piece of gummed paper onto an instrument." The answer to this is that sealed instruments and agreements in writing not under seal have different qualities, and a seal is the only visible mark by which the difference between them is indicated. Unless the distinctions between the two classes of documents are to be done away with and both are to be put on the same footing, then it is important that a seal should continue to be used for the practical purpose of showing that an instrument is intended to operate as a sealed instrument does now. To my mind it is a great advantage that the intention of the parties that a contract shall operate in one way or the other can be shown by a means so simple and so well known as affixing or omitting a seal.

No suggestion has been made that the qualities of sealed instruments, or those of unsealed instruments, ought to be changed, so that the qualities of both classes shall be the same. On the contrary the only subject seems to have been to abolish the use of seals without losing the qualities of sealed instruments and without giving those qualities to unsealed instruments. Five drafts of provisions for abolishing the use of seals were made last winter when a bill relating to conveyancing was before the legislature, and they were all abandoned for want of success in drawing a clause that would abolish the mark of the distinctions between sealed and unsealed instruments without abolishing the distinctions themselves.

The first of these drafts (House bill 950, s. 4) abolished the use of seals upon deeds and instruments *affecting* real estate, and provided that the addition of a seal should not affect the validity of any such instrument. The next draft (House bill 955 amended, s. 27) provided that an instrument without a seal *conveying* any interest in real estate should have the same effect as if a seal were affixed. The former appears to have put all instruments on the footing of parol contracts as regards the form of execution and the contracts contained in them, and the latter to have put all instruments conveying any interest in real estate upon the same footing as deeds, although a deed might not have been required for the purpose by the present law. To avoid some of the difficulties of the latter draft, the language was changed in a third draft so that any instrument *relating to* [instead of "conveying" as before] any interest in real estate should have the same effect as if a seal were affixed. There is no indication that the authors of these successive drafts had any preference for the qualities of either of the two classes of instruments over those of the other, even if they took into consideration the differences between them.

The remarkable changes in the law that would result from any of these provisions will be seen at once if some of the distinctions between sealed and unsealed instruments are kept in mind. For example, (1) the different rules of the statute of limitations (R.L.c. 202, ss. 1, 2); (2) the necessity for a consideration in the case of a contract not under seal, while no consideration is required for a contract under seal (*Mather* v. *Corliss,* 103 M.p. 571); (3) that a deed takes effect upon delivery, although the delivery is made to a third person and does not come to the knowledge of the other party till afterwards (*Mather* v. *Corliss,* 103 Mass. 568), while a contract not under seal does not take effect until it has been assented to by both parties (Leake Contracts (5th ed.) 13); (4) that an undisclosed principal may be bound by an agreement not under seal (*Lerned* v. *Johns,* 9 Allen 419, 421), while a deed binds only the persons in whose names it is made (*Elwell* v. *Shaw,* 16 Mass. 42, 46); (5) that an agent to execute an instrument under seal must have an authority under seal (*Warring* v. *Williams,* 8 Pick. p. 327), but in the case of a contract not under seal (*Shaw* v. *Nudd,* 8 Pick. 9, 12) or a lease not under seal (*Shaw* v. *Farnsworth,* 108 Mass. 357) his authority need not be in writing. If anyone will try the application of those distinctions to any of the drafts above mentioned, he will see where they would land him. Any of them would

make changes in the law relating to conveyances and contracts, for which no reason has been suggested and which probably nobody desires.

The fourth draft made last year attempted to avoid difficulties created by the third draft by limiting the provisions of that draft to certain specified instruments, and provided that these instruments without a seal should have the same effect as if a seal were affixed, except that this should not alter the effect of the statute of limitations. Among the specified instruments were agreements for sale and leases, which do not now require a seal and might be expressed in a series of letters, and which were thereby made subject to all the rules relating to sealed instruments although the parties might not so desire. I do not know whether the clause about the statute of limitations was intended to mean that the specified documents should not be considered as sealed instruments as regards the statute of limitations, when no seal was added, or that the statute of limitations should be applicable to all of them as if a seal were affixed, either of which would be a strange provision.

The fifth draft, which was prepared by Mr. Grinnell, provided that no instrument relating to real property should be invalid for lack of a seal, but that this provision should not be construed to affect the statute of limitations or any other rule of law which distinguishes sealed from unsealed instruments. This seems to put all conveyances and the agreements contained in them on the footing of unsealed instruments, unless a seal is affixed to them, and leaves the statute of limitations and other rules of law to be applied accordingly. But I am not sure whether the proviso was actually intended to mean this, or what it was really intended by it.

I have mentioned these different experiments in drawing clauses for abolishing the use of seals, because they show how crude and ill considered the scheme is, and how little attention has been given to the differences in substance and effect between sealed and unsealed instruments. They proceed on the mistaken assumption that a seal is only a useless formality, but, in abolishing its use, they unintentionally change the character of the instrument. All of them include in their provisions some instruments which do not now require a seal, but which are often made under seal and have a different effect according as a seal is affixed or not. Such conveyances as now require seals generally contain covenants, and, if the conveyance was made valid without a seal, the covenants in a conveyance so executed would be only simple contracts and be governed by dif-

ferent rules from those applicable to covenants. The conveyance itself also might consist only of a letter or a series of letters, and might be made by an agent whose authority was not in writing, as any other contract may be when a seal is not required. I doubt if such an absence of all formality would be convenient. On the other hand, if it were provided that all conveyances, or instruments relating to real estate, should without a seal have the effect of sealed instruments, then documents that do not now require a seal (including letters) would become sealed instruments and be subject to all the rules above-mentioned regarding such instruments.

It should also be observed that the proposal to change the law as to seals extends only to instruments relating to real estate, and some of the drafts that have been prepared extend only to part of them. It would be a great public inconvenience if a new technical rule were established by which unsealed instruments relating to real estate, or some such instruments, would operate as sealed instruments, while other similar instruments would operate as simple contracts. The rules regarding the use and effect of seals are now simple and well understood and ought not to be complicated in any such manner. If it would be an advantage to abolish the only mark of the distinction between sealed and unsealed instruments, while at the same time the distinction itself is retained, in all or some of the transactions relating to real estate, it would also be an advantage to do so in other matters. No attempt has been made to show that there would be any such advantage in any case.

THE PROPOSED UNIFORM JOINT OBLIGORS ACT AND PROF. WILLISTON'S EXPLANATORY NOTES.

HOUSE BILL - - - - - - - - No. 187 of 1928

Accompanying the second recommendation of the Commissioners on Uniform State Laws (House, No. 185). Judiciary (Joint). Dec. 9, 1927.

An Act concerning the Discharge of Obligors bound for the Same Debt or Liability and to make Uniform the Law relating thereto.

SECTION 1. The General Laws are hereby amended by inserting after chapter one hundred and nine A, inserted by chapter one hundred and forty-seven of the acts of nineteen hundred and twenty-four, the following new chapter to be numbered one hundred and nine B and to be entitled "The Discharge of Obligors bound for the same Debt or Liability":—

CHAPTER 109B.

THE DISCHARGE OF OBLIGORS BOUND FOR THE SAME DEBT OF LIABILITY.

Section 1. In this chapter, unless otherwise expressly stated, obligation includes a liability in tort; obligor includes a person liable for a tort; obligee includes a person having a right based on a tort. Several obligors means obligors severally bound for the same performance.

Section 2. A judgment against one or more of several obligors, against one or more of joint, or of joint and several obligors shall not discharge a co-obligor who was not a party to the proceeding wherein the judgment was rendered.

Section 3. The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint, or of joint and several obligors, in whole or in partial satisfaction of their obligations, shall be credited to the extent of the amount received on the obligations of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

Section 4. Subject to the provisions of section three, the obligee's release or discharge of one or more of several obligors, or of one or more joint, or of joint and several obligors shall not discharge co-obligors, against whom the obligee in writing and as part of the same transaction as the release or discharge, expressly re-

serves his right; and in the absence of such a reservation of rights shall discharge co-obligors only to the extent provided in section five.

Section 5. (*a*) If an obligee releasing or discharging an obligor without express reservation of rights against a co-obligor, then knows or has reason to know that the obligor released or discharged did not pay so much of the claim as he was bound by his contract or relation with that co-obligor to pay, the obligee's claim against that co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the released or discharged obligor was bound to such co-obligor to pay.

(*b*) If an obligee so releasing or discharging an obligor has not then such knowledge or reason to know, the obligee's claim against the co-obligor shall be satisfied to the extent of the lesser of two amounts, namely (1) the amount of the fractional share of the obligor released or discharged, or (2) the amount that such obligor was bound by his contract or relation with the co-obligor to pay.

Section 6. On the death of a joint obligor in contract, his executor or administrator or estate shall be bound as such jointly and severally with the surviving obligor or obligors.

Section 7. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 8. This chapter may be cited as the Uniform Joint Obligations Act.

SECTION 2. Section eight of chapter one hundred and ninety-seven of the General Laws is hereby repealed.

SECTION 3. This act shall take effect July first, nineteen hundred and twenty-eight, but shall not apply to obligations arising prior to said date.

MEMORANDUM BY PROF. SAMUEL WILLISTON (ONE OF THE COMMISSIONERS OF UNIFORM STATE LAWS), SUBMITTED TO THE JUDICIARY COMMITTEE IN SUPPORT OF UNIFORM ACT.

JOINT OBLIGATIONS BILL.

The common-law regarding co-obligors for the same debt admittedly caused injustice in certain cases. Nearly all states, including Massachusetts, have in consequence made some changes by statute in the rules of the common-law. But the statutes in the different states vary from each other, and none of them fully take care of the hard situations created by the common-law.

In Massachusetts there are statutory provisions aimed at the evils covered by Sections 2 and 6 of the proposed bill, and these sections may first be referred to.

Section 2.

Section 2 is aimed to reverse the common-law rule that judgment against one joint debtor releases the others. This result is partially achieved by Section 15 of Chapter 227 of the General Laws which provides that if service is not made on all of "several defendants" because of "their absence from the Commonwealth or for other sufficient cause" judgment may be rendered against those served with process and if that judgment remains unsatisfied, action may be had against any of the other joint contractors as if the contract had been joint and several.

The common-law rule is still in force except as this Statute changes it (Longvist v. Lammi, 242 Mass. 574, 576); and the Statute does not cover what is perhaps the hardest case, namely where the plaintiff is ignorant of who all the joint debtors are, as in the case of dormant partners, and therefore does not name all the joint debtors as *defendants,* who are not served. Furthermore what is "sufficient cause" for not serving a defendant. The better rule is that of the bill which throws on a joint defendant who is sued the burden of making any objection of non-joinder of others, and if the others are not brought into the case, leaves them still liable to action.

Section 6.

Section 6 of the bill is in some measure covered by Section 8 of Chapter 97. This establishes a several liability of the estate of a deceased joint debtor, but it is necessary to proceed separately against a surviving joint debtor and against the estate of the deceased debtor (Von Arnim v. American Tube Works, 188 Mass. 515, 520). The fact that judgment against the survivor must be against him personally, while judgment against the representative of the deceased debtor does not seem an adequate reason for compelling two suits.

Sections 3, 4 and 5 relate to matters not dealt with in the Massachusetts statutes.

Section 3.

It seems at least theoretically possible for a creditor to contract with one co-debtor to refrain from suing him in consideration, not of part payment of the debt but of a separate and additional pay-

ment. It seems just to require that whatever the creditor receives shall be credited on the debt.

Sections 4 and 5.

There are two cases where a discharge of a co-obligor discharges others.

(1) where they are joint debtors;

(2) where though not joint debtors, the one discharged is a principal debtor and the other a surety.

These technical rules are the cause of frequent injustice. They go beyond reasonable requirements.

Co-obligors may as between one another be bound ultimately to discharge the debt in any proportion imaginable. One may be purely an accommodation party or his interest may be one-half, one-third, or any other fraction. The creditor should not be allowed knowingly to impair the interest of one by releasing others. If knowing the party released ought to bear a certain share of the debt, he releases the party, the debt should be extinguished as to all parties to that extent, but to that extent only. If ignorant of the relation between the debtors, the creditor should assume that all are bound in equal shares and be chargeable with the same consequences as if they were, subject to this exception: If the debtor released is a surety or chargeable with less than a ratable share of the debtor, the creditor has the good luck of inflicting less harm on the other debtors than he might have expected, and should not be held responsible for any greater injury than he has actually caused.

A BUSINESS MAN'S VIEWS ON THE CHOICE OF AN EXECUTOR.

The Editor has received the following from a member of the Association:

> *Editor Massachusetts Law Quarterly*:
>
> "In view of the extensive advertising by trust companies I suggest for your consideration the giving of some publicity to the address of Mr. Victor M. Cutter, President of the United Fruit Company, last evening, an excerpt of which is given in this morning's Herald and in which he gives a good lawyer as his first choice as an ideal executor."

EXTRACT FROM MR. CUTTER'S ADDRESS OF OCTOBER 20, 1927, BEFORE THE CORPORATE FIDUCIARIES ASSOCIATION.

"My ideal executor is a good lawyer, an active real estate man, a conservative banker, a tax expert, a public accountant, and an able business man. There has been some difficulty in finding an executive possessing these attributes. Therefore it reduces to choice of most trusted relative or friend or business acquaintance who has the greatest number of the abilities enumerated, in addition to character. This difficulty is most frequently solved by making a fiduciary institution executor or trustee. It is certain that an alternate should be provided, and in addition to one alternate, there should be provision for a fiduciary institution. This insures continuity of competent administration of an estate.

"There are, of course, the added advantages in the ease of the fiduciary institution of ready access to reliable information on investments, business ability, tax experience, and the other attributes I have named. This, of course, constitutes the great superiority of the institution as compared to the individual as executor or trustee.

"The first requisite is that an executor or trustee shall be faithful to his trust."

A SUGGESTED PRACTICE AS TO DISBARMENT.

The Judicial Council has recommended a plan for official committees of inquiry of the bar in different districts of the state to be selected by the Supreme Judicial Court with a paid secretary and power to summon witnesses, etc., to deal with complaints against lawyers, instead of the existing unsatisfactory situation in which the disagreeable work is all left to the bar association committees with no powers. The bar associations try to do it because there is no one else to do it. Whether the legislature will adopt the recommendation, we do not know. But there are certain cases which might well be handled without waiting for action by a bar association. Occasionally a lawyer is convicted of embezzlement, or some similar offense utterly inconsistent with the confidence placed in him or with common honesty. Why should not the court, upon conviction, forthwith direct a hearing on the question of disbarment of its own motion? This suggestion is based on the opinion of the Supreme Judicial Court in the matter of Casey, 211 Mass. at p. 193.

F. W. G.

MINOR NEXT-OF-KIN AND THE RIGHT TO PETITION FOR ADMINISTRATION.

The Judicial Council called attention to a situation of practical importance resulting from language in the opinion of the court in *McDonald* v. *O'Dea*, 256 Mass. 177.

G. L. c. 193, §§ 1, 2, and 3 provide:

> "SECTION 1. Administration of the estate of a person deceased intestate shall be granted to one or more of the persons hereinafter mentioned and in the order named, if competent and suitable for the discharge of the trust and willing to undertake it, unless the court deems it proper to appoint some other person:
>
> *First*, the widow or surviving husband of the deceased. *Second*, the next of kin as the court shall determine. *Third*, if none of the above are competent or if they all renounce the administration or without sufficient cause neglect for thirty days after the death of the intestate to take administration of his estate, one or more of the principal creditors, after public notice upon the petition. *Fourth*, if there is no widow, husband or next of kin within the commonwealth, a public administrator.
>
> "SECTION 2. Administration of the estate of an intestate may be granted to one or more of the next of kin or any suitable person, if the husband or widow and all the next of kin resident in the commonwealth, who are of full age and legal capacity, consent in writing thereto. Notice of the petition may be dispensed with as if all parties entitled thereto had signified their assent or waived notice.
>
> "SECTION 3. If a person dies leaving an estate which may be liable to an income tax under chapter sixty-two or a legacy or succession tax under chapter sixty-five, and a will disposing of such estate is not offered for probate, or an application for administration made, within four months after his decease, the probate court, upon application by the commissioner of corporations and taxation, may appoint an administrator."

In the case of *McDonald* v. *O'Dea*, a man died leaving a sister and two nieces all non-residents and a minor grand-niece as the sole next of kin in the Commonwealth. The guardian of the grand-niece petitioned and was appointed administrator. On appeal by the sister, the court decided that the probate court had no power under G. L. c. 193, §§ 1 and 2, to appoint the guardian "a stranger to the estate" administrator. The court said in its opinion that the guardian had no legal capacity to consent in writing to the appointment and that the statutes did not "entitle the guardian to petition for administration of the estate of which his ward is not entitled to

the residue''. In this case, the sister and two nieces resided outside the Commonwealth and were, therefore, entitled to part of the residue.

It appears from the opinion that, *''No citation was issued on the petition''* in the O'Dea case. This seems to be the turning-point of the decision although it is not clearly so stated. If a citation had been issued and published, it is difficult to see why the court would not have jurisdiction to appoint any ''suitable'' person. While the court says that a guardian is not entitled to petition for administration with the important qualification, based on a Rhode Island decision that he may so petition if the ward is entitled to the whole residue, there seems to be nothing in the statutes to prevent a minor heir or next of kin resident in the Commonwealth from petitioning by his or her guardian. Certainly, as suggested by the court, if the minor is entitled to the whole residue he, through his guardian, would seem clearly entitled as a matter of justice to petition for the appointment of some competent person who would protect and administer the estate in the interest of this sole minor beneficiary rather than that the appointment should be made of a creditor or stranger.

This view is strengthened by the fact that the statute expressly provides for the appointment of a public administrator only in case there is no ''next of kin within the Commonwealth''. There seems to be so much misunderstanding and uncertainty, however, on the bench and at the bar that it is to be hoped the standing of a guardian and ward in such cases will be definitely settled by the legislature at its present session.

Until the matter is thus cleared up, three points seem to stand out from the statutes as interpreted by the opinion in the O'Dea case: first, that a guardian cannot be appointed administrator on his own petition without the issuance of a citation; second, that a minor resident next of kin entitled to the whole residue is entitled to petition in his or her name by the guardian for the appointment of ''some suitable person'' and that there is nothing to exclude the guardian from the class of ''suitable persons'' to be considered by the court. Indeed, a guardian if suitable to be guardian and having the care of all the other property of the ward, may be the most natural and suitable person to be administrator in such a case; third, there seems to be nothing to prevent a similar petition in the name of a resident minor next of kin by his or her guardian even though there are other resident next of kin in or out of the Com-

monwealth although of course in such a case the guardian might not be as suitable a person under some circumstances as where the petitioning ward is entitled to the entire residue and if there are other next of kin of age residing within the Commonwealth one of them would be entitled to appointment by preference if "competent and suitable".

If all this is true under the law as it stands, it is difficult to see what is meant by the statement in the opinion in the O'Dea case that the statutes do not "entitle the guardian to petition for administration" unless that statement is strictly limited to a case in which no citation is issued, because as already pointed out, the statutes contain no provision limiting the right of petition to persons who are entitled to be appointed. Cf. Newhall "Settlement of Estates" 2nd Ed. §§ 15 and 4. F. W. G.

THE NEED OF MORE JUDICIAL EDITING.

The attention of conveyancers is called to the fact that the opinion in Greenberg v. Lanigan, handed down on January 16 and printed in Advance Sheets, p. 349, was recalled on January 18th. The opinion was sent out in print and caused some comment at the bar before it was recalled.

That opinion, and the opinion in the O'Dea case, are typical of a number of other opinions in cases rightly decided, but in which the bar have been surprised to find unnecessary statements which unsettled practice and caused unnecessary litigation. By the usual practice of our court we understand that only the judges who heard the argument take part in the decision and preparation of the opinion. We suggest that if the practice were tried of circulating the opinions in *typewriting, photostat or print,* to each judge, whether he heard the argument or not, so that he could read it before it is handed down, some of these unfortunate dicta would be eliminated. More than seven legible typewritten copies can easily be made at one stroke by using thin carbons and thin paper. The photostat process has developed so that it is now suggested for public records. (See H. 679 before the present legislature.) The judges who did not sit on the case might not have time to study the record but they could read the opinion, as the bar has to read it after it comes down, and some member of the court would be likely to notice things which the bar now notices. It is just as important that future unnecessary litigation and current uncertainty and consequent expense to clients should be avoided, as that existing

litigation should be decided. We believe that the court would save itself later work and the bar and the community much trouble and expense if this course should be followed. In other words, why should not the judges who do not sit help to edit the opinions of those who do? It is better if possible to catch mistakes before they are made in the same way that the bar catches them when it reads the opinions after they are made. There is nothing new about this suggestion.

In the Report of the Judicature Commission (see reprint in MASSACHUSETTS LAW QUARTERLY for January, 1921), appear the following passages:

> "Ever since the beginning of the recorded history of American law, one fruitful source of litigation has been the appearance in reported opinions of dicta or language the meaning of which has not been clear to the bar, and which has not always been required for the decision of the case. Because such language has not always received the same careful consideration given to the points actually decided, doubts have arisen as to the real state of the law, which have resulted in needlessly interfering with ordinary business, or have furnished the basis for lawsuits. This must happen occasionally in any event, and the present discussion is not intended as a complaint or a criticism of any court. Every court occasionally says things which are not clear. No human beings can avoid it. But with the present output of judicial opinions, and the growing interest all over the country in the study of methods which will result in the elimination of unnecessary litigation and the more effective disposal of business, it is important to consider whether there may not be a practical method of reducing to a minimum this particular cause of litigation and uncertainty in the law.
>
> "We understand that it is the practice of the Supreme Court of the United States to have each opinion set up in proof and submitted to each judge before it is adopted, and that sometimes a number of revised proofs of the opinion are thus submitted. This practice has the advantage of enabling each judge, not only to read and consider all the statements in the opinion, but to see it set up in type. Every lawyer knows that the test of reading something in type is a practical test which is most effective in concentrating his attention upon the different parts of a statement thus printed. It seems important that opinions should be printed before they are adopted, in order that each statement and all the reasoning may be fully appreciated by each judge."

The practice of the Supreme Court of the United States dates back more than forty years. F. W. G.

THE LOSS OF NATHAN MATTHEWS AND ITS EFFECT ON HISTORICAL STUDIES.

By the death of Mr. Matthews the community lost not only one of its leading lawyers and citizens,—an enthusiastic student and an effective exponent of the law,—but a man who knew more than most living members,—probably more than any other living member,—of our bar, about the early history of Massachusetts law,—a man who did much unknown public service toward making available the still unstudied sources of Massachusetts history. He contributed to the development of sounder government in many ways but this note deals with his historical labors and hopes for assistance.

Little attention has been paid thus far to Mr. Matthews' appeal for funds to save from the ravages of time the unique historical material in the county court records of Suffolk and Middlesex Counties by printing them for the use of historical students as was done with those of Essex County. His friends or public spirited citizens of the great community which he served, could pay no more fitting tribute to his memory than to carry out the purpose to which he devoted so much study and thought and which he believed to be of the greatest importance to the public in the proper understanding of our history. He hoped that it would be accomplished in his life time. His explanation of the character of the material and the reasons for its publication were stated with convincing force in an address before the Massachusetts Historical Society in 1923 (reprinted in MASSACHUSETTS LAW QUARTERLY for Feb., 1925, p. 146). The publication of the Essex County records was under the supervision of the Essex Institute. It is suggested that either the Massachusetts Historical Society or the American Antiquarian Society, or possibly a temporary "foundation" called, "The Matthews Foundation" might raise the necessary funds by an appeal to individuals and organizations interested in history to carry out this plan. Mr. Matthews estimated that the Suffolk County papers from the beginning down to the Province Charter in 1692 could be printed in from eight to ten volumes at a net cost of about $3,000 per volume and that the work could be completed within five years. He estimated the cost for both Suffolk and Middlesex Counties as not over $50,000. Certainly the publication of these original records would be of far greater historical value than many things that are printed today at very considerable expense. We believe such publication

would be not only a fitting tribute to Mr. Matthews but one of the most deserving enterprises that men or women with public interests could contribute to.

The movement which Mr. Matthews started to try to obtain permission to publish the Massachusetts Code of 1648, parts of which are still law in Massachusetts, should be followed up. The only known copy is in another state and the photostat copy in the State House was furnished by the then owner of the original with the condition that it should not be published. While this condition is entitled to all reasonable and fair respect in the effort to secure the consent of the present owners, to whom it was presented, one cannot help wondering by what right, legal or moral, any individual or other body could or can withhold from the Commonwealth of Massachusetts, or any other government, the contents of a document containing part of its laws, or permission to publish the same for the information of its citizens. We do not believe that the accident of private purchase of original copies of state laws includes the right to withhold from the state government either the knowledge of, or the right to publish, the contents when the original official copies have disappeared from the state archives. We do not believe such things can become the private property of collectors *to such an extent*. While appreciating the instincts and interest of collectors, we cannot imagine that the prior owner, if he were still living, or the present owners would refuse a courteous request from the representatives of the state government for consent to publish this code. We suggest that such a request should now be made.

We also hope that the manuscript of the address on this code and other features of the seventeenth century history of Massachusetts delivered by Mr. Matthews before the Boston Bar Association in December, 1926, may be available for publication by that association as it was intended by Mr. Matthews that it should be. The historical contributions and material of such a student should be available.

F. W. G.

QUARTERS OF THE BOSTON JUVENILE COURT CRITICIZED.

Milwaukee Judge Calls Basement Quarters Here Deplorable. Urges Citizens to Visit Session.

(From the "Boston Herald" of August 18, 1927.)

Judge John C. Karel of Milwaukee, Wis., President of the Equitable Fraternal Union and a Delegate to the National Frater-

nal Congress at the Hotel Statler, scored the deplorable condition of the Boston Juvenile Court quarters and called on the community to unite in demanding more adequate facilities for the session of this Court.

Judge Karel, who has presided over the Juvenile Court sessions in Milwaukee for many years, recently visited the Court of Judge Frederick P. Cabot, where he found the surroundings anything but pleasing.

CONDITIONS DEPLORABLE.

While Boston is recognized as one of the oldest cities of the country, he said, there is much she can profit by from the experiences of younger but more energetic and progressive cities of the country. After paying his compliments to Judge Cabot, he said:

> "If there are any Bostonians proud of their city and at all interested in the most important of all courts in their community, I ask them to visit the juvenile court quarters, and you will find a more deplorable condition than in any similar court in the country. Located in the basement of the Court House, poorly lighted and ventilated, with cramped, unsanitary quarters for Judge and official associates, a condition exists which is a sad reflection upon the duties of the governing body obligated to look after the needs of such an important court in a city the size of Boston."

He said the Juvenile Court is an institution administered on the assumption that its fundamental function is to put each child who comes before it in a normal relation to society as promptly and as permanently as possible, and that while punishment is not by any means to be dispensed with, it is to be made subsidiary and subordinate to that function. In other words that as far as practicable the children should not be treated as criminals, but as children in need of aid, encouragement and guidance.

He declared in closing "A better understanding of the Court by the general public and a more co-operative spirit, would bring about better feeling and make possible the greatest use of the resources of the community."

(See Boston Post, same date and Editorial in Boston Globe, 8/19/27.)

COURT CONGESTION OWING TO MOTOR VEHICLE ACCIDENTS.

The third report of the Judicial Council (reprinted in QUARTERLY for November, 1927), contains (at pp. 84–87) a special report made to the Governor in April, 1927, at his request, on a proposal of James E. McConnell, Esq., for an automobile accident board, similar to the Industrial Accident Board, to relieve the courts. In this report various aspects and difficulties of the problem were considered and the view expressed that the effect of the compulsory insurance law on the volume of litigation had not then become sufficiently clear and that it was too soon to pass on it. Since that report it has become clear that a very marked increase in automobile cases has resulted from the compulsory insurance law and the subject is still under serious consideration by the Judicial Council which is planning a study of such cases beginning with Middlesex County. An interesting report has been made by the New York Calendar Committee which was sent to the legislature by Governor Smith and is here reprinted. That report and all similar suggestions thus far have centered about an administrative Committee to take the cases out of court. The idea of providing a simple and more effective system of dealing with such cases in court has been overlooked. The Judicial Council has received a valuable suggestion along this line which is being studied. In order to focus attention on the problem and invite further suggestions from anyone interested this plan and Governor Smith's message are here reprinted.

F. W. G.

GOVERNOR SMITH'S MESSAGE TO THE NEW YORK LEGISLATURE.

STATE OF NEW YORK,
EXECUTIVE CHAMBER.
ALBANY, *January* 9, 1928.

To the Legislature:

In my Annual Message, I called attention to the congestion of Court Calendars because of vehicular accidents and the suits for damages growing out of them. Because of this situation, the Special Calendar Committee of the Appellate Division of the Supreme Court in the First Department appointed a Committee

to consider possible relief measures. I have received a communication from this Committee which here follows:

"NEW YORK CITY, *December* 12, 1927.

"Hon. ALFRED E. SMITH, *Governor of the State of New York, Albany, New York.*

"YOUR EXCELLENCY:

"In pursuing its studies of remedies for calendar congestion, the Special Calendar Committee of the Appellate Division of the Supreme Court, in the First Department, has during the past year given serious consideration to the very serious situation presented by the great and rapidly increasing number of motor vehicle accidents.

"Under date of December 1, 1927, the Police Department of the City of New York reports that for the first ten months of 1927, in vehicular highway accidents in the City of New York, there were 358 persons killed and 10,675 injured, all under sixteen years of age, and 589 persons killed and 23,289 injured, all over sixteen years of age, the total number killed being 947 and the total number injured 33,964.

"These appalling figures are, of course, reflected in the huge volume of cases pending and undisposed of in the courts. Of the 4,436 cases filed in the Supreme Court, New York County, in October, 1926, seventy-five per cent. were to recover for death, personal injuries and loss of services growing out of accidents. Of the 9,444 cases filed in the Supreme Court, New York County, from March to December, 1927, 6,915, or over seventy-three per cent., were for death, personal injury and loss of services growing out of accidents.

"These figures, of course, do not take into account the great number of similar cases in the City Court of the City of New York or in the Municipal Court.

"While exact figures showing what proportion of these tort cases result from motor vehicle accidents are not at hand for all of the courts in this county, it is the judgment of those competent to speak that more than half of this huge volume of litigation is made up of motor vehicle accident cases. It is, therefore, apparent that the great and increasing number of these cases is very directly related to the problem of calendar congestion.

"While a prompt and just disposal of this class of cases is a normal function of the courts, the inevitable result, under existing conditions, is a deplorable slowing up in the disposition of commercial and all other classes of litigation. Considering the comparatively small verdicts that, as a rule, are rendered in these accident cases, the length of time that elapses between an accident and the recovery of compensation, the cost to litigants and the evils of the contingent fee system as now in force, and the great cost to the public of manning and maintaining the courts that are now struggling to keep abreast with the constantly rising tide of such cases, our

Committee has felt impelled to consider whether there could not be put into effect some other and better system of dealing with the great mass of such cases.

"Apart from the problem of calendar congestion, the situation has another serious aspect. Only seventeen per cent. of the persons taking out motor vehicle licenses in this State carry insurance covering damages inflicted by the motor vehicles operated by them. As prudent and solvent owners are most likely to carry insurance, careless and insolvent owners are most likely to be found among the eighty-three per cent. who carry no liability insurance. It is estimated that eighty per cent. of all automobiles are sold on time, and in such cases the owners frequently own but a small equity in a mortgaged car. It is a natural result and a common experience that after all the delay and expense incident to a suit for injuries, the party at fault is frequently found judgment-proof and without means.

"In the cases of injuries caused by automobiles engaged on behalf of the Government in the discharge of governmental functions the personal injury suit affords no remedy. In the numerous 'hit and run' cases, no identification being possible, the victim is helpless. Claims against non-residents also present serious difficulties. In most cases where an accident is caused by an automobile driven by a member of a family or an agent outside the owner's business the personal injury suit affords no practical remedy. But given a case within the law, and an identified solvent defendant, the difficulty of fixing the blame in the average automobile collision case is such as frequently to render the result of a jury trial largely a matter of gamble both as to liability and damages. The situation in personal injury cases has been well summed up by Judge Robert S. Marx, of Cincinnati:

> " 'In brief, the law today is that the injured victim can recover damages provided he can (1) identify the automobile which injured him; (2) prove that the owner was subject to suit and that the driver was an authorized agent; (3) establish the negligence of the driver; (4) show freedom from the slightest degree of contributory negligence; (5) outlive a delay of about two and a half years; and provided that (6) the defendant is good upon execution and (7) "error" does not intervene.'

"We are strongly impressed with the necessity for a change in our present method of dealing with accidents from the use or operation of motor vehicles on public highways.

"It has been strongly urged that a thoroughgoing method of reforming the situation above outlined, calculated to reach at the same time the evil of calendar congestion and the social and economic problem, would be to apply the principle of the Workmen's Compensation Law to compensation for injuries resulting from motor vehicle accidents. This would be done by requiring every

owner of a motor vehicle, as a condition of obtaining a license to operate what the courts have deemed to be a dangerous instrumentality over the public highways, to provide compensation for the disability or death of any person caused by an injury arising from the use or operation of a motor vehicle on the public highway without regard to fault as a cause of the injury, except, of course, that there should be no liability for compensation when the injury has been solely occasioned by the intoxication of the injured person or by willful intention of the injured person to bring about the injury. Such compensation would be secured either by the owners insuring and keeping insured the payment of such compensation in a State fund, administered by the Insurance Department, analogous to the case of workmen's compensation, or by procuring the required insurance from an insurance company, or by becoming a self-insurer under permission and regulations of the Superintendent of Insurance. In case of injury, by administrative methods similar to those in the Workmen's Compensation Law, the injured party, or in the case of death, his next of kin, would be entitled to receive compensation, up to a stated maximum amount, based upon wages and earnings, as in the case of workmen's compensation.

"Both because it would be unreasonable and may involve constitutional questions to compel all persons, regardless of great differences in earning capacity, to accept such compensation, such a plan, if adopted, should leave a party injured free to elect to sue in the courts. In the great mass of cases, however, we are satisfied, resort will be had to the insured compensation, for the benefits would be speedy, certain and free from a great burden of legal expense.

"During the past two years numerous bills have been introduced in the Legislature, following the pioneer bill of Senator Straus, dealing with this subject, but thus far neither the principle nor the features of the necessary legislation have had the critical study and public debate that should accompany a proposal for such a far-reaching change.

"During the coming session of the Legislature the old bills and the new ones dealing with this subject will undoubtedly be introduced. Our studies have convinced us that the problem is involved in so many complexities, concerning which expert, reliable and adequate information is at present lacking, that we would not be justified in definitely committing our Committee to any particular bill or even to the principle without being assured of a satisfactory method of its application, until further light is let in upon the whole subject.

"While many earnest advocates of the reform are satisfied that the annual cost would not exceed twenty dollars per motor vehicle, this vital matter of cost is shrouded in uncertainty. It requires expert actuarial advice and the power to obtain by subpoena data from insurance companies. Owing to the far greater range in wages and earning capacity of those who would be entitled to the benefits of this insurance, as compared with those covered by the Workmen's

Compensation Law, the advisability of basing compensation upon wages or earning capacity requires careful examination. The problem of dealing with accidents caused by motor vehicles licensed in neighboring States presents difficulties. Strong differences of opinion will exist as to whether the compensation should be provided by a State fund, which may be the cheapest way, or through the medium of the insurance companies, or both. The merits of these several proposals, as well as public sentiment concerning same in different sections of the State, need to be sounded out. In short, both the importance and the difficulties of the whole subject are such as, in our opinion, to require thorough investigation by a competent commission before any legislation is attempted.

"We, therefore, earnestly urge that you recommend to the Legislature at the beginning of the session that there should be appropriate legislation providing for such a commission, with the requirement that its inquiries be begun at once, so that, if possible, a report may be made to the Legislature before adjournment. We shall on our part be very willing to co-operate in every way to assist the efficient functioning of such a commission.

"With great respect, we are

"Yours sincerely,

"(Signed) VICTOR J. DOWLING, *Chairman*,
HENRY W. TAFT, *Vice-Chairman*,
CHARLES E. HUGHES,
JOSEPH M. PROSKAUER,
SAMUEL SEABURY,
JEREMIAH T. MAHONEY,
TIMOTHY A. LEARY,
CLARENCE J. SHEARN,
SOL. M. STROOCK,
WILLIAM D. GUTHRIE,
F. B. DELEHANTY,
PETER SCHMUCK,
JAMES A. FOLEY,
BERNARD S. DEUTSCH."

I urge upon you that you carry out the recommendation made by these distinguished jurists and members of our judiciary system. I shall be glad to co-operate in every way to bring this about.

(Signed) ALFRED E. SMITH.

A PLAN FOR JUDICIAL ARBITRATION OF AUTOMOBILE CASES SUBMITTED TO THE JUDICIAL COUNCIL.

I am of opinion that it is possible to have many of the so-called automobile cases arbitrated by the court and so have a speedy determination of them, without formal legal procedure and without

great expense to the Commonwealth or the parties. It has been said, by many who are in a position to know, that a considerable part of the time of the courts is taken up by the trial of these cases; that the average of the findings of the courts and the verdicts of the juries therein is probably less than $500. We all know that the cost to the Commonwealth and the counties for the trial of the ordinary automobile case in the Superior Court with jury is almost $500.

I suppose it would be constitutional to provide that in all cases where plaintiffs and defendants were occupants of registered motor vehicles operating on a public highway at time of the accident, they shall be deemed to have waived such legal rights as they might otherwise have, such as a jury trial and formal court procedure. There must be many such cases.

Where, however, the plaintiff is not an occupant of such vehicle but is a lawful traveler upon the highway his legal rights of course, cannot be taken from him by any statutory provision. He may, however, waive his rights. I believe he might do this in many cases if he was given advantages which he otherwise would not have, such as speedy, inexpensive, informal arbitration by the court.

I believe that an attempt should be made to bring about informal judicial arbitration of automobile cases using the buildings, machinery and orderly processes of the court with its splendid traditions. I do not think, except as a matter of last resort, that we should create other tribunals and machinery with their attendant expense to the Commonwealth. Nor do I think that we should further whittle away business which can be conducted by the legal profession through the courts far better than by any other method or agency.

I therefore venture to submit a rough draft—a very rough draft—of an act for automobile accident arbitration.

First Draft Act.

An Act to Provide for the Speedy Arbitration by the Court of Certain Actions for Damage to Person or Property by the Negligent Operation of a Registered Motor Vehicle on a Public Highway.

Section 1:—In an action of tort for personal injuries or for damages to property when caused by the negligent operation of a registered motor vehicle on a public highway the defendant, if he is the owner of such vehicle, or the person in lawful possession thereof, shall, by reason of the acceptance of a certificate of registration or by the operation of such vehicle upon a public highway be deemed to have waived a trial by jury, the rules of evidence and the

right to appeal from or take exceptions to any ruling, order, judgment or decree. If the plaintiff at the time of such injury or damage was an occupant of a registered motor vehicle he also shall be deemed to have waived such matters. Thereupon the issues as raised by the pleadings in the case shall be arbitrated by the court.

SECTION II:—If the plaintiff was not an occupant of a registered motor vehicle at the time of such injury or damage the issues raised by the pleadings in the case shall be arbitrated by the court provided such plaintiff shall make a like waiver by a writing filed by him in the clerk's office within 10 days of the time fixed by law or allowed by the court for filing of the defendant's answer.

SECTION III:—All cases under the above sections shall be advanced by the court so that they may be heard with as little delay as possible.

MEMORANDUM NO. 2.

SPEEDY ARBITRATION OF AUTOMOBILE ACCIDENT CASES BY THE COURT.

I enclose herewith another draft of an act containing provisions for arbitration by the court of certain cases of injury to person or property sustained by reason of the negligent operation of a registered motor vehicle on a public highway.

I believe that in a very large number of such cases both parties, plaintiff as well as defendant, are occupants of automobiles as in the ordinary cases of the collision of two motor vehicles.

If Section 1 of this draft is constitutional, and I am strongly of the opinion that it is, such cases may be determined by arbitration by the court as there provided. This would result in speedy, informal trials with a large saving of time and money to the Commonwealth and Counties as well as to the parties. Indeed it seems to me to be a simple way to relieve the courts, the Superior Court especially, of much of its work. I think that lawyers, and parties as well, would much rather have arbitration by the court than by any other tribunal which may be established by the general court.

Section 2 of the draft provides for those cases where one of the parties was not in a vehicle but was injured by one which was negligently operated, that is he was a pedestrian or traveler lawfully upon the highway. In order to get a speedy trial I believe that many would so waive. In time legislation along these lines will, I think, be popular.

SECOND DRAFT ACT.

AN ACT TO PROVIDE FOR THE SPEEDY ARBITRATION BY THE COURT OF CERTAIN ACTIONS FOR DAMAGE TO PERSON OR PROPERTY BY THE ALLEGED NEGLIGENT OPERATION OF A REGISTERED MOTOR VEHICLE ON A PUBLIC HIGHWAY.

SECTION I:—The acceptance of a certificate of registration of a motor vehicle issued by authority of law or the riding in such

vehicle upon a public highway shall, in any action at law, brought by or against any occupant thereof, to recover damages for personal injuries sustained by reason of the alleged negligent operation of such vehicle upon a public highway, constitute a waiver of the following:—(1) A trial by jury. (2) The rules of evidence. (3) The right to appeal from or take exceptions to any ruling, order, judgment or decree. The issues raised by the pleadings in such case shall be arbitrated by the court.

SECTION II:—Any party to such action who was not an occupant of such vehicle at the time of the injury or damage may have the issues raised by the pleadings arbitrated by the court provided he waives the above enumerated matters by a writing filed in the clerk's office within ten days of the time fixed by law or allowed by the court for filing answer. If, however, such party does not so waive then the provision of Section I shall not apply.

SECTION III:—All cases for arbitration under the above sections shall forthwith be advanced by the court so that they may be heard with as little delay as possible.

AN UNFORTUNATE SUPERIOR COURT DECISION FOR CONVEYANCERS.

JANUARY 13, 1928.

Editor "Massachusetts Law Quarterly":

I spoke to you the other day about a most unfortunate decision for conveyancers, banks and all other parties interested in real estate, which was recently made in the Superior Court by Judge and which it seems to me forces a most alarming breach in our recording system by making it impossible for even the most diligent examiner to guard against attachments.

The statute through which Judge has driven a coach and four, is G. L. c. 223, sec. 66 (Acts of 1907, chap. 370). A draft for such an act was drawn by the Abstract Club and presented to the Legislature by me, the motive being alarm over the case of Norris v. Anderson, 181 Mass. 308. The wording of the act as it stands seems to me so bad that Judge certainly had some basis for his decision, though it still appears to me unfortunate and unnecessary. How the act ever came to be so unsatisfactorily worded, I cannot, after the lapse of twenty-one years, explain. There was quite a sharp fight on it in the House and I imagine that the present form represents some compromise of phraseology by the Legislative Committee. As interpreted by Judge , the act becomes nonsense as he himself admits. As he interprets it, it furnishes the purchaser or mortgagee with protection against the man who attaches under a wrong name and who tries to correct it, but with no protection whatever against the man who makes the same mistake and does not try to correct it at all.

Of course it is still uncertain whether the Supreme Court would sustain this ruling but if the Supreme Court should take the same view, then, obviously, not only is every title and every mortgage hereafter passed upon, quite possibly subject to unknown attachments which cannot be guarded against, but every title which has already been passed, within, say the last twenty years, may likewise be so.

It is unfortunate that in the case referred to the equities are somewhat with the attaching creditor, since he got the last name right and the first names are perhaps *idem sonans,* so that a very careful conveyancer might have been led to a closer inquiry; but the decision was not put on this ground.

The situation created is so serious that it seems to me that the Abstract Club, the Boston Real Estate Exchange, and the Massachusetts Conveyancers Association, together with any other business organizations which may be interested, should unite to consider it and if thought necessary to take it up at this year's session of the Legislature. I enclose herewith a copy of Judge decision. The case is Lena Solomon et al vs. Philip Nessen et al, Suffolk Superior Court in Equity No. 29178.

I may add that through courtesy of Judge I was allowed to present to the Court as *amicus curiae*, a statement of the circumstances with regard to the bill and a recapitulation of the arguments used before the Legislature, which, of course, constituted a presentation of the strong reasons of policy for upholding the recording system. This was admissible to aid the Court in arriving at a conclusion as to the intention of the Legislature in passing the act. I got the impression that the Court felt that there was force in the argument as to policy but also felt that while protection of the recording system might have been what the Legislature had intended, it was not what the Legislature had said.

Yours very truly,

FRANCIS N. BALCH.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. SUPERIOR COURT IN EQUITY

No. 29178

LENA SOLOMON ET AL *vs.* PHILIP NESSEN ET AL.

FINDINGS OF FACT, RULINGS, AND ORDER FOR DECREE.

This suit was tried with another suit against the same defendants brought by Harry Bates et al and numbered 29295. Both suits depend upon similar facts.

I find that in 1917 one Barnett Neiterman acquired title to certain real estate in Boston comprising lots "B", numbered 44 Arbutus Street, and "C" numbered 40 Arbutus Street, and other land. While the record title stood in his name, the defendants Philip Nessen and Abraham Nessen brought an action of law against Barnard Neiterman by a writ dated July 17th, 1923, and attached all right, title and interest of the said Barnard Neiterman in and to any and all real estate in the County of Suffolk. An attested copy of the writ with so much of the return of the officer as related to said attachment was deposited in the Registry of Deeds for Suffolk County on the date of the writ and the attachment was duly

indexed in the Record of Attachments in said Registry. This action was brought to recover a commission for the sale of real estate numbered 40 and 44 Arbutus Street (lots "B" and "C") and other land, the record title to which then stood in the name of Barnett Neiterman.

In December, 1923, and while the said attachment was outstanding and undischarged on the record, Barnett Neiterman conveyed a portion of the real estate to which he had acquired title in 1917, as hereinbefore stated, and including lots "B" and "C", to Julius Block and Harvey Solomon, and by subsequent conveyances through the said Block and Solomon the plaintiffs Bates and Penansky acquired title to lot "B" and the plaintiffs Solomon and Shechtman acquired title to Lot "C". The said attachment against Barnard Neiterman has never been discharged, and the defendants Nessen, having recovered judgment in their said action against Barnard Neiterman, are proceeding to sell the real estate conveyed to the plaintiffs as aforesaid, by virtue of the execution which issued as the result of said judgment in said action. The plaintiffs seek to enjoin said sale and in effect to remove what they claim to be a cloud upon their titles.

Barnett Neiterman and Barnard Neiterman are one and the same person, although none of the plaintiffs knew this to be the fact when they took title. Neiterman was known to some extent by the names of Barnard Neiterman, Barnett Neiterman, and Bernard Neiterman, and he also at times used the name of Barney Neiterman. In his banking transactions he usually signed his name "B. Neiterman".

All of the plaintiffs are bona fide purchasers for value, and the only question is whether they took title subject to the attachment against Barnard Neiterman. The Barnard Neiterman who is described as defendant in the action at law brought by the defendants Nessen, and in which the attachment above described was made, is the same person described as Barnett Neiterman and who is the grantor in the plaintiff's chain of title. In the record of attachments in the Registry of Deeds, under the heading "Neiterman", were recorded two attachments, the first against Barnett Neiterman and made on June 15, 1923, and on the line just beneath this, the second, which was against Barnard Neiterman and made on July 17, 1923. Both these attachments were against one and the same person, the Neiterman hereinbefore described. When the title was being examined just prior to the conveyance by the said Neiterman to Block and Solomon the attorney made no effort to ascertain who Barnard Neiterman was or whether he was in any way related to, connected or identified with Barnett Neiterman. If an examination had been made or at any subsequent time the writ would have disclosed that the *Barnard* Neiterman named as defendant was served with a summons at his last and usual place of abode, "No. 183 Callender Street, Dorchester district", and the declaration in the action would have disclosed that the claim was for a commission

for procuring a customer for the very property which was being purchased. Further investigation would have disclosed that *Barnett* Neiterman, the grantor in the title chain, lived at the same 183 Callendar Street, Dorchester.

The plaintiffs claim that they were not required to take any notice of the recorded attachment against Barnard Neiterman and that their titles are not affected by it, and they refer to section 66 of chapter 223 of the General Laws.

In Norris v. Anderson, 181 Mass. 308, it is said: "The only ground which can be urged against the validity of the attachment at the first is the mistake in the name of the defendant. The defendant was in fact John Kovarik of Woburn. The misnomer may have been matter for abatement if John Koverik saw fit to plead it in abatement but the writ was a writ against him. No statute provides that an attachment of real estate shall be inffectual or void if the defendant is wrongly named in the writ, nor does any statute or decision require in terms that the documents which show the attachment shall state the correct name of the defendant. The attachment cannot be ruled as matter of law not to have been an attachment of the estate of John Koverik because it described the property as that of John Kaverik of Woburn, it being shown that John Kaverik was not the name of any person and that the mistake was not in any way fraudulent or an attempt to conceal the attachment."

I find the attachment was valid when made. The said Neiterman had notice of the action at law which the defendants brought against him and the defendants in bringing their action, so far as it appears from the evidence, did not use the name of another person nor did they fraudulently use a fictitious name nor did they fraudulently attempt to conceal the fact that an attachment had been made.

My interpretation of section 66 of chapter 223 of the General Laws (see Acts of 1907, chapter 370) is that it does not apply to the facts of this case so as to entitle the plaintiffs to relief. There was no amendment of the writ in the action brought against Neiterman. *This interpretation may leave a plaintiff who attaches on a writ wherein the defendant owner is wrongly named and who does not amend in a better position than a plaintiff who does amend and it may seem that the legislature could not have intended this. However, the remedy sought by the petitioners seems to have been granted by the legislature and no more.*

Let a decree be prepared dismissing the plaintiff's bill with costs.

The plaintiffs requested me to give the following three rulings:

> 1. That an attachment made by a writ wherein the defendant is not a record owner of the land sought to be attached, is invalid as against a bona fide purchaser from the record owner, who had no knowledge of such attachment or

who had no knowledge that the land so purchased by him was intended to be attached by the writ.

2. That an attachment made against Barnard Neiterman is invalid as against land standing in the name of Barnett Neiterman.

3. That upon the evidence the bill of complaint must be sustained and an injunction issued as prayed for.

I refuse all of them.

JUSTICE, SUPERIOR COURT.

APRIL 18, 1927.

, J.

NOTE.

G. L. c. 223, §66, reads:

> "*Section 66.* If the copy of the writ is deposited, as aforesaid, within three days after the day when the attachment was made, the attachment shall take effect from the time it was made, otherwise, from the time when the copy is so deposited; but attachments of land, and of leasehold estates which have an original term of more than seven years, shall not be valid against purchasers in good faith and for value, other than parties defendant, except from the time when the copy is deposited as aforesaid, *or, in cases where the owner of the land sought to be attached is wrongly named in the writ, and the writ is afterward seasonably amended in that respect, then except from the time when a correspondingly amended copy is deposited as aforesaid.*"

The words in italics were added by St. 1907, c. 370. These words seem to be reasonably adapted to the purpose of protecting innocent purchasers from attachments made on writs in which the defendant's name has been mistaken and do not seem to require the result reached by the court.

When a statute is passed for no conceivable object except to carry out the purpose of the recording act, we know of no rule of statutory construction which requires an interpretation that makes nonsense out of the statute. We should imagine that the purpose of the recording acts would be the dominant purpose and this appears to have been the attitude of the Supreme Judicial Court in 1841.

The recording system was first extended to attachments by the Revised Statutes in 1835 on recommendation of the commissioners by R. S. ch. 90, §§ 28–30. In the notes to ch. 90 the commissioners explained their reasons for recommending them as follows:

"An attachment of real estate operates as a mortgage; but with this peculiarity, that it may remain for a long time wholly unknown to the supposed mortgager, and to those who have occasion to deal with him. So long as this process is allowed to be executed without notice to any one, and without any open and notorious act on the land affected by it, it gives to every sheriff and deputy sheriff an extraordinary power over the estates of others, which he may sometimes exercise without any responsibility except to his own conscience. An officer who is corrupt, or who is only careless, may merely by antedating his return defeat a preexisting title, and transfer a valuable estate from one man to another; and as he may write and sign the return, when he is alone and without any witness, the injured party may be wholly without redress. But even when the return is true, it may be kept secret from purchasers and others interested, who may thus be defrauded or injured without any fault or negligence on their part.

"The attachment of real estate, when followed by a levy or execution, operates as a statute conveyance which takes effect from the date of the attachment; yet, unlike all other conveyances, it may be kept wholly secret for two or three months; and it is not recorded in the registry of deeds until the execution is levied, which may be two or three years after the attachment. No purchaser can feel secure in his title, however clear it may appear in the registry of deeds, without inquiring of the sheriff and all his deputies, and of the coroner of the county and also of the marshal of the United States for the district and all his deputies, to know if they have made any attachment on the estate. It is believed that titles by attachment may without inconvenience be placed on the same footing with other titles, so that the registry of deeds may in all cases furnish the security which it was designed to afford against clandestine and fraudulent conveyances. For this purpose the commissioners would respectfully propose the following sections, to be inserted in this place, if they should meet the approbation of the legislature."

The substance of the sections recommended was adopted in the following form:

R. S. c. 90. "*Sect. 28.* No attachment of real estate, on mesne process, or against any person who shall afterwards purchase the same for a valuable consideration and in good faith, unless the original writ or a copy thereof, and so much of the officer's return thereon as relates to the attachment of such estate, shall be deposited in the office of the clerk of the court for the county in which the lands lie, which copy shall be certified by the officer, but need not contain the declaration in the writ.

"*Sect. 29.* If the writ or copy is deposited as aforesaid, within three days after the day on which the attachment is made, the attachment shall take effect from the time it was made, otherwise it shall take effect from the time when the writ or copy is so deposited.

"*Sect. 30.* The said clerk shall note, on every such writ or copy, the day, hour and minute when he receives it, and shall file the same in his office. He shall also enter, in a book to be kept for that purpose, the names of the parties in such writ, designating who is plaintiff and who defendant, the time when the attachment was made, and the time when the writ or copy was deposited, and his fee in each case shall be twenty five cents, for which he shall not be holden to render any account, and which shall be paid on the delivery of the writ or copy, and may be taxed for the plaintiff in his bill of costs."

The question of interpretation of these three sections arose in 1841 in *Inhabitants of Cheshire* v. *Briggs,* 2 Met. 486. The court (consisting of Shaw, C. J., Putnam, Wilde, and Dewey, J. J.), held as follows:

"The facts stated in the present case only show the usual return by the officer, on the writ, of an attachment, but no other deposit of the writ in the office of the clerk, than necessarily occurs in all cases of actions at law entered and prosecuted in the usual course of practice, without any purpose of securing a lien by attachment. This, it seems to us, is not sufficient to give force and validity to the attachment. The statute referred to has materially changed the former law on the subject, and requires other acts of notoriety besides the return of the officer indorsed on the writ.

"Attachments of real estate are required to be entered in the book kept for such purpose, by the clerk of the court. There must be, as heretofore, a return of the attachment indorsed on the writ; and that may be effectual as an attachment, even before the deposit of the writ or copy thereof, if the writ is deposited within three days from the time of making such attachments; otherwise, from the time when the writ or copy is so deposited. But before the clerk can be required to make such entry in his book of records of attachments, the writ or copy should be delivered to him, for the purpose and with the view of having such entry made as will secure a lien by attachment.

"It results from this view of the statute regulating attachments of real estate, that the attachment, returned on the plaintiffs' writ against David Sherman, was so far defective as to be liable to be defeated by a conveyance from Sher-

> man to a *bona fide* grantee; and the estate having been thus conveyed, during the pendency of the action in court, the attachment was thereby lost."

In comparing this opinion with the statutes referred to, it appears that the statutes were no more, and perhaps were less, definite than the section of the General Laws now under discussion. Practically the only guiding fact for the court in the statute was the requirement that a twenty-five cent fee should be paid to the clerk to enter it as a lien in his book. Yet the court carried out the purpose of the recording act as explained by the Commissioners on the Revised Statutes in the passage already quoted. The commissioners' notes were not referred to in the opinion, but those notes of Charles Jackson and his associates were so well-known to the bench and bar in those days that it is safe to say they were consulted whenever any question was raised as to the meaning of the statutes.

It would probably save much time and uncertainty if this practice of examining the notes of that commission of 1835 were resorted to in connection with every question of interpretation arising today under any provision of the General Laws, any part of which dates back to that time. The work of that commission in its draftsmanship and notes forms a permanent and considerable part of the background of all the statutory law of Massachusetts.

F. W. G.

A FORGOTTEN SEVENTEENTH CENTURY LEGISLATIVE WORD THE MEANING OF WHICH DESERVES REMEMBRANCE.

The leading Puritan pioneers, although they were not practising lawyers, were students of law and developed ideas and sometimes used words in a discriminating sense which lawyers and legislators may well study today. The following extract from an essay on the "Constitutional History of Boston" by C. W. Ernst calls attention to the seventeenth century Massachusetts word "prudential" as it was used in thinking about government in New England. The word still appears as part of the general description of the powers of the governing bodies of cities and towns in G. L., chap. 40, §21, but its broad significance, particularly in the early history of Massachusetts, seems to have been largely forgotten. This broad meaning of the word has a direct bearing upon current discussions as to the excessive number of "petty" offenses which are called and treated as "criminal" in our statute book and the need of reclassifying many of such petty offenses and taking them out of the criminal class, if practicable, in order not only to relieve congestion in the courts but to encourage more respect for the whole system of criminal law. As pointed out by the Judicial Council in its first report, the system suffers in the minds of the public because many things which have no real criminal element are classified with serious crimes—in other words, a man who does not shovel the snow from the sidewalk is classified as a criminal. Anyone can think of many other instances. The whole subject is under consideration at present by the Judicial Council. In connection with it the following extract may be interesting and suggestive.

EXTRACT FROM AN ESSAY ON THE "CONSTITUTIONAL HISTORY OF BOSTON" BY C. W. ERNST (pp. 21–22).

> The Boston city charter (Acts of 1854, chapter 448, section 2) vests in the City Government "the administration of all the fiscal, prudential, and municipal concerns of said city." The same term "prudential" is found in the Body of Liberties, 66: "The freemen of every township shall have power to make such by-laws and constitutions as may concern the welfare of their town, provided they be not of a criminal, but only of a prudential nature, and that their penalties exceed not 20 shillings for one offense" (Col. Laws, 1660, ed. Whitmore, 47). In 1642 the General Court used

the same term in alluding to "the chosen men" or selectmen of every town, and described them as "appointed for managing the prudential affairs of the same" (2 Mass. Records, 6). In 1646 the following was called a prudential law: "Every township, or such as are deputed to order the prudential affairs thereof, shall have power to present to the Quarter Court all idle and unprofitable persons, and all children who are not diligently employed by their parents" (3 Mass. Rec. 102). The term passed into the general laws of the Colony, the Province, and the Commonwealth, and still survives. The Colony Laws of 1660 (ed. Whitmore, 195–6) authorize towns to "make such laws and constitutions as may concern the welfare of their town, provided they be not of a criminal, but of a prudential nature, and that their penalties exceed not twenty shillings for one offense, and that they be not repugnant to the public laws and orders of the country;" also, "to choose yearly, or for less time, a convenient number of fit men to order the planting and prudential affairs of their towns, according to instruction given them in writing." The term appears to be the coinage of Nathaniel Ward, the "Simple Cobler of Agawam," and was first used as the opposite of "criminal." Criminal and other matters reserved for state jurisdiction were not touched by the selectman, who was confined to town affairs, many of which were not provided for in the by-laws or orders, yet called for action. These matters were to be prudently dealt with by the selectmen, and came to be called the prudentials of the town. When the law was silent, and the town meeting had not spoken, the selectmen were yet bound to act where the welfare of the town was concerned; they administered also the by-laws of the town and the general laws, except those relating to law courts, crimes, and state affairs. These municipal interests were aptly called prudential affairs, as distinct from affairs of the commonwealth, on the one hand, and from those confided to constables, on the other. The Massachusetts towns still have the right to make "such necessary orders and by-laws, not repugnant to the law, as they may judge most conducive to their welfare . . . for directing and managing the prudential affairs, preserving the peace and good order and maintaining the internal police thereof" (Mass. Publ. Stat. ch. 27, sec. 15). The terms "selectman" and "prudential" mark the transition from English to Massachusetts law, and show how little our towns, their prudential affairs and selectmen, owe to English precedents. A new thing usually finds for itself a new name. Yet the men who managed English municipal corporations in the time of Elizabeth and James I. were usually called "select" bodies, and the founders of Massachusetts know that term.

GOV. SMITH'S RECOMMENDATION ABOUT SENTENCING CRIMINALS.

In view of the interest and discussion aroused by Governor Smith's recently reported views about sentences the following reference to the subject in his message to the New York Legislature is reprinted from the "Times".

"Last year, at my request, the Legislature established a temporary Crime Commission. This commission has already reported many laws for the punishment and restriction of crime. It has reported also on preventive measures. It is continuing its studies in these fields and will report measures and recommendations for your consideration during this session.

"I have for some time, because of my direct experience with the results of the administration of criminal justice, become deeply impressed that we could make a great stride in the direction of real justice if we changed somewhat our methods of administering it. We are dealing with human beings, no two of whom are ever under normal circumstances exactly alike. How much more are they likely to differ under abnormal situations.

"We have progressed in our knowledge of the processes of the human mind and the influence on it of physical conditions. I would like to see that knowledge applied to the determination of the kind and duration of punishment best adapted to bring about the restoration of delinquents to normal social life.

"Because of my belief that justice sometimes miscarries because those charged with determining guilt are often affected by the thought of the sentence to be imposed for a given crime, I would suggest that the Crime Commission give careful study and consideration to a fundamental change in the method of sentencing criminals.

"After guilt has been determined by legal process, instead of sentence being fixed by Judges according to statute, I should like to see offenders who have been adjudged guilty detained by the State. They should then be carefully studied by a board of expert mental and physical specialists who, after careful study of all the elements entering each case, would decide and fix the penalty for the crime.

"I realize the complexity of such a fundamental change. It probably requires even constitutional amendment. Therefore I recommend that your honorable bodies request the Crime Commission to report to you, after due and careful study of the proposal, whether such a change is advisable and how it can be brought about. It appeals to me as a modern, humane, scientific way to deal with the criminal offender."

ADVISORY REFERENDA ON FEDERAL CONSTITUTIONAL AMENDMENTS.

Governor Smith's message to the New York Legislature in January, of this year, contained the following passage:

> Referendum on Amendments—Inasmuch as the Federal Government leaves the State free in its choice of approval or disapproval of amendments to the Constitution, I would suggest amendment to our own Constitution in this State, to the end that no future amendments to the Federal Constitution be acted upon by the Legislature before referendum by State statute to the people.
>
> We have the strange situation in this State today that we require a vote of the people to amend our own Constitution, but the liberty enjoyed by our people during all of our national life can be abridged overnight by a bare majority vote of the elected Representatives in both Houses of the Legislature. I believe that this situation has gone as far as any one thing to arouse the indignation of great groups of people.
>
> The will of the majority is a fundamental democratic principle that admits of no compromise. When the people have thus spoken that is the end of it.

Whatever may be the *pros* and *cons* of a state constitutional amendment in New York on the subject, the established Massachusetts policy and practice show that no constitutional change is legally needed. As Governor Smith's recommendation has brought the practice into the foreground for current discussion the following address relating to the subject is reprinted.

AN ADDRESS BEFORE THE SENTINELS OF THE REPUBLIC AT THE HOTEL BILTMORE, NEW YORK, ON JANUARY 13, 1927.

BY FRANK W. GRINNELL.

(Reprinted by permission from the Constitutional Review for July, 1927.)

I have been asked to explain to you an experiment in constitutional government recently tried in Massachusetts and its results, with some information as to its history and suggestions as to its possible bearing upon similar problems in other states.

The Constitution of the United States has been talked about by a great many people in eloquent oratorical language almost ever since it was adopted. In an article on *Eloquence at the Bar and*

Elsewhere, in the *American Law Review* for February, 1882, appears the following passage:

> In the days when the chief reading was English literature, the Latin and Greek classics, the Bible, the Constitution, and pamphlets on political parties of the United States, it was not only comparatively easy for an orator to know what his audience would respond to, but it was sure that if they listened at all they would at least admire a familiarity with those few fields of learning which were not only admitted, but claimed on all sides, to be the Elysian fields of a happy intellectual life. Such reading, also, was directly stimulating to the ready and graceful utterances of a few ideas in the midst of abounding sentiment.

That particular style of discussion is hardly adapted to this distinctly and, one might almost say, excessively practical generation. In order to be understood, therefore, when we talk about the Constitution and its relation to the government and the lives of the people all over the United States, we must try to talk about it in simple and direct language and avoid the use of adjectives and superlatives which causes so many of the younger generation to demand the "debunking" of much of our historical writing and political oratory.

But this does not mean that the very practical theory of government, which the Constitution was intended to express, should be ignored or disparaged merely because the men who thought out the plan for establishing the government as a going concern and the men who adopted it and learned to make it go lived more than a hundred years ago. President Lowell, in one of his books, has called attention to the fact that some people seem to act on the assumption that nobody's ideas about government are worth paying much attention to unless he did his thinking within the last thirty years. I happen to be one of those, however, who while discounting the exaggerated oratory on the subject of our Constitution, believe that some of the constructive thinkers of the Revolutionary era from 1761 to 1789 were, and are today, on the whole, among the soundest, most far-seeing, and advanced thinkers about fundamentals whom we have to look to for guidance for the future. This is not "stand-pat" conservatism by any manner of means. It is merely an attempt to get down to brass tacks and to avoid not only the exaggerated language of the nineteenth century, but to avoid also the exaggerated language of many of the current twentieth century philosophers or reformers.

One result of what I have referred to as the "excessively" practical tendencies of the present generation is snap-judgments based on the apparent probability of quick effects and the assumption that all the good things in our present government will remain whether or not we stop to think how they got there. There is a striking passage by the late Professor William G. Sumner which illustrates all this:

> In a century and a half or two centuries there has grown up here all this vast and complicated industrial organization which we now see with its hundreds of occupations, its enormous plant and apparatus of all kinds, connected throughout by mutual relations of dependence, kept in order by punctuality and trustworthiness in the fulfillment of engagements, dependent upon assumptions that men will act in a certain way and want certain things, and, in spite of its intricacy and complication, working to supply our wants with such smoothness and harmony *that most people are unaware of its existence. They live in it as they do in the atmosphere.*

In the same way, most of the American people live under the protection of their constitutional government as they do in the atmosphere, being largely unaware of its existence as far as any conscious understanding of its nature and history is concerned.

An observant writer in the *New York Times* of June 29, 1924, who had been traveling about the country for twenty-five or thirty years, emphasized this fact. He said:

> To most people, the Constitution is a sacred relic in a glass case, not to be taken out or looked at. It might as well be a gold fish.

He emphasized it with a cartoon showing Uncle Sam with his hand on the Constitution saying to a surprised lawyer, "They don't know what is in it," and since they do not know what is in it many of them do not appreciate the difference between a constitutional amendment and an ordinary statute. I think that this is particularly true of amendments to the Constitution of the United States partly from lack of teaching in the schools, partly from lack of general reading and that discussion of public affairs which used to furnish part of the variety of interest and entertainment of people before it was supplanted by the "movies" and other distractions; but, also, very largely because the procedure for submission and ratification of such amendments is entirely a legislative matter first by Congress and then by the state legislatures. Most men's ideas about legislative actions are very vague. They are apt to think of

them all as of the same character. The more permanent character of a constitutional amendment as distinguished from a statute is an idea which does not "get across" to many people until, perhaps, it is too late.

People do not realize that a constitutional amendment, as Mr. Walter Lippmann has recently pointed out in *Harper's Magazine*, may so tie the hands of the nation or its various parts as to prevent reasonable and natural experiments in government from time to time in the light of changing conditions and fuller knowledge of causes and effects.

It is one of the great functions of an organization such as this to remind the American people and their representatives in Congress and in the state legislatures that knowledge of, and education as to, the meaning of constitutional principles and the difference between a constitutional amendment and a statute was one of the fundamental ideas upon which our governments, both state and national, were founded.

This fact was expressed in the early bills of rights, thus, in the Virginia Bill of Rights of 1776, described in the preamble as "the basis and foundation of government," the fifteenth paragraph reads that

> No free government, or the blessing of liberty, can be preserved to any people but . . . by frequent recurrence to fundamental principles.

The same idea was expressed by John Adams in the eighteenth article of the Massachusetts Bill of Rights of 1780 when he said:

> A frequent recurrence to the fundamental principles of the Constitution . . . are absolutely necessary to preserve the advantages of liberty and to maintain a free government;

and that the people

> have a right to require of their law-givers and *magistrates* an exact and constant observance of them in the formation and execution of the laws.

These ideas are neither theoretical nor out of date merely because they were written over a hundred years ago. They were expressed to impress upon the voters and their representatives the necessity of understanding what they were doing. But the number of voters as well as the number of representatives was relatively small then. Communication between different parts of the country

was difficult. Because of lack of other distractions, interest in public affairs, in acts of legislatures and of Congresses was relatively greater, because it formed part not only of the interest but of the entertainment of the people. Then, if such a thing as a proposed amendment to the Constitution of the United States was seriously considered, it would advertise itself to public attention for special discussion. That is not the case today in the welter of proposals of every kind to regulate everybody and everything. All this results in loosening the sense of responsibility of representatives who know that many people are too busy to think about their government. We are all aware that under these circumstances one of the practical principles in government today in this country is the principle of "passing the buck" or "let George do it."

It is commonly rumored that one of the recent amendments was submitted by Congress with the expectation and hope on the part of many congressmen who voted for it that the state legislatures would not ratify it and that the responsibility would thus be thrown on the state legislatures. When it came before the state legislatures, many felt that because of peculiar conditions existing at the time in politics some of the state legislatures including Massachusetts practically threw the responsibility on the shoulders of other states and voted to ratify without thorough consideration and before the people of the state had an opportunity to consider it sufficiently.

To meet this condition of affairs, Senator Wadsworth and others proposed an amendment (known as the Wadsworth-Garrett Amendment) to the Constitution of the United States that members of at least one house in each of the state legislatures shall be elected after an amendment is proposed and that any state may require the confirmation by popular vote of ratification by a legislature. This proposed amendment has been vigorously discussed on both sides and it is not my present purpose to discuss it, but simply to point out that, while the discussion is going on, there are other possible courses of action open to the people of the states to secure the deliberate and widespread consideration of proposed amendments. I wish to explain how one state has already acted in a most effective manner under the Constitution as it stands without raising any legal questions of procedure for lawyers to disagree about.

It has been the traditional practice in Massachusetts to deliberate pretty thoroughly before taking a serious constitutional step. The Massachusetts Constitution of 1780, the substance of which is

still in force today, was the first state constitution to be submitted to the voting population of that day in the town meetings after its provisions were framed by the Constitutional Convention, of which its draftsman, John Adams, was a member.

In 1820, when the provision for amendments was adopted, it was specified that an amendment must be considered and approved by two successive legislatures, not two sessions of the same legislature, but two separate legislatures with a state election coming in between, before the amendment was submitted for ratification to the voters at the polls. This requirement still exists.

After the recent amendments to the Federal Constitution had been considered and acted upon rather hastily and without any popular vote, the members of the legislature in 1920 woke up to the fact that amendments to the Federal Constitution were not receiving the same deliberate and careful discussion that was given to amendments to the state constitution because there was nothing to require the legislature to stop and think. Accordingly, by Chapter 560 of the Acts of 1920, the Massachusetts legislature made a public declaration of the policy of self-restraint, that great underlying principle of all American constitutional government. The act recited that

> It is hereby declared to be the policy of the Commonwealth that the General Court, when called upon to act upon a proposed amendment to the Federal Constitution, should defer action until the opinion of the voters of the Commonwealth has been taken, as herein provided, relative to the wisdom and expediency of ratifying the same.

After this preamble, it was provided that, if a proposed amendment to the Federal Constitution is not ratified at the session at which it is submitted, the question *shall* be placed upon the ballot at the next state election as follows:

> Is it desirable that the proposed amendment to the Constitution of the United States (describing the same) be ratified by the General Court?

In other words, here was a simple, natural declaration of policy based upon the spirit of fairness to constituents. The test whether a particular method of proceeding was "fair to constituents" is the test that Charles Jackson, the grandfather of Mr. Justice Oliver Wendell Holmes, has sent down through the history of Massachusetts from a speech in the Constitutional Convention of 1820.

This declaration of policy in the Act of 1920 is not, of course, binding upon any future legislature. This fact is recognized in the language of the act itself which assumes that the legislature may, if it sees fit, disregard the test of fairness to constituents, rush in, and ratify at the same session at which an amendment is submitted without giving an opportunity for the advisory vote provided for in the act. This was the way the law stood in 1924 when the Child Labor Amendment was submitted by Congress late in the spring and near the end of the legislative session in Massachusetts. There was an attempt on the part of some enthusiasts to rush the legislature into a ratification of this amendment during the last few days of the legislative session in June, 1924. But the sounder judgment prevailed and the legislature followed its own declaration of policy of 1920 by providing by Chapter 509 of the Act of 1924 for the taking of an advisory vote at the next state election, as stated in the act, "For the purpose of ascertaining the opinion of the people of the Commonwealth as to the desirability of ratifying the proposed amendment to the Constitution of the United States." The amendment was quoted in full upon the ballot and each voter was given an opportunity to answer the question, "Is it desirable that the General Court ratify the following proposed amendment?"

The subject was more thoroughly debated in the public press than is usually the case with such questions. The result was 241,461 votes for the amendment and 697,563 votes against it. So decisive a popular vote, while it had no legal binding effect whatever, not only settled the question in Massachusetts, but has had, of course, a wide influence throughout the country when the matter has come up for action in other states.

I understand that the New York legislature has never acted upon this question and that it may come up at any session for consideration. If and when it does, I respectfully suggest to the representatives and people of New York that they adopt this simple practice of ascertaining popular sentiment before taking final action upon this and all other amendments to the Constitution of the United States which may be submitted by Congress. There is nothing new about the idea in New York. A state-wide expression of opinion on another subject has been taken very recently. What I wish to suggest is that the most important ideas of government which survive are those principles of self-restraint on the part of American majorities, the nature of which is generally appreciated as fair when they are understood.

I submit that the voluntary declaration of policy on the part of each state legislature, regardless of its power under the Constitution of the United States, should not commit the state (for we must remember it is a question of committing the state and not merely of committing that particular legislature) until it had taken an advisory vote. It is a very simple thing to do. The vote can be taken at the next state election or it can be taken at a special election, if necessary, specifically provided for by statute, but I believe that the people of the several states would recognize the fairness of such a practice of self-restraint on behalf of their representatives and that the development of this sense of fair dealing and deliberate discussion in the minds of the people might be better understood and consequently more important than the adoption of the Wadsworth-Garrett or any other amendment attempting to regulate the procedure by law.

I have spoken of the simple procedure adopted by Massachusetts to secure an expression of public sentiment in regard to proposed constitutional amendments. I have stated the resulting figures of the advisory vote on the Child Labor Amendment, but I want to emphasize before closing, the way in which this Massachusetts experiment in 1924 put into actual practice the idea, expressed in the eighteenth article of the Massachusetts Bill of Rights of 1780 and the fifteenth paragraph of the Virginia Bill of Rights of 1776 which I have already quoted, about the importance of "a frequent recurrence to the fundamental principles of the Constitution."

The debate on the subject in the newspapers and elsewhere for a month or two before election was one of the fullest and, for that reason, healthiest, debates on any measure submitted to popular vote in the history of the Commonwealth. While it became in spots quite heated and personal, the wide-spread attention which was called to the subject brought out from individuals in different parts of the Commonwealth suggestions which are worth consideration by the representatives and people in other states. As an illustration,—what seemed to me the most interesting letter in the whole debate was written to the newspapers by Mr. Joseph Lee, of Boston, under the title, *Child Labor and Local Responsibility,* reprinted in MASSACHUSETTS LAW QUARTERLY for February, 1925, p. 79.

I hope that the people of other states and their representatives will join with those of Massachusetts in setting an example for all the states of "fairness to constituents" by starting in practice a sound procedure to be followed before ratifying future constitu-

tional amendments—a procedure which requires not constitutional changes and raises no legal questions whatever, a purely advisory procedure but one which, if adopted, will result in a broader knowledge and a better understanding of the Constitution of the United States and its history and meaning for all concerned and one which, because it involves no change in the present language of the Constitution, raises no question as to the possible meaning and effect of any new language which may be suggested for lawyers to disagree about. Legislators could then consider the question of ratification more responsibly and in the light of the advisory vote and the public debate which it causes.

The early settlers of New England, as John Winthrop tells us, developed certain practices as part of a common law of New England. The American people can develop, if they wish without changing a line of the Constitution, a fair practice in regard to amendments which will insure a better understanding of our whole system of government. While Massachusetts has tried the experiment, other states can take the lead in the future in putting that experiment into practice in such a way as to encourage its study in every state of the Union.